UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

T. ROWE PRICE TAX-FREE HIGH YIELD FUND, INC., SMITH BARNEY INCOME FUNDS/SMITH BARNEY MUNICIPAL HIGH INCOME FUND, DRYDEN NATIONAL MUNICIPALS FUND, INC., LOIS AND JOHN MOORE and ACA FINANCIAL GUARANTY CORPORATION

Plaintiffs,

v.

KAREN M. SUGHRUE, GARRY L. CRAGO, JEAN W. CHILDS, PAULA EDWARDS COCHRAN, G. STEVENS DAVIS, JR., JULIA B. DEMOSS, WILLIAM R. DILL, LESLIE A. FERLAZZO, JOYCE SHAFFER FLEMING, ERIC W. HAYDEN, CATHERINE CHAPIN KOBACKER, ANNE MARCUS, CELESTE REID, RICHARD J. SHEEHAN, JR., JOSEPH SHORT, GREGORY E. THOMAS, SUSAN K. TURBEN, DONALD W. KISZKA and ADVEST, INC.,

Defendants.

Civil Action No. 04-11667 RGS
Consolidated into
Civil Action No. 05-10176-RGS*

PLAINTIFFS OPPOSITION TO DEFENDANTS MOTIONS TO DISMISS

*The original Motion to Dismiss was filed in the 04-11167-RGS case but the case has since been consolidated into 05-10176. For the Court s convenience, Plaintiffs have filed their Opposition to the Motion to Dismiss under both civil action numbers.

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On May 13, 1998, Bradford College (Bradford or the College), a small private liberal arts college in Haverhill, Massachusetts floated a $17.93 million bond issue, the proceeds of which were to be used to build and renovate dormitories for the school s students. The financing was bold, given that the college had failed to generate any surplus for nine straight years, and had only balanced its budgets by withdrawing money from its endowment or soliciting gifts. Nonetheless, the Official Statement, the offering memorandum pursuant to which the bonds were sold, described a plan to operate profitably in the future based on an increased enrollment and reductions of financial aid. The key to the viability of this vision was selective evidence described in the Official Statement that indicated that the college was successfully attracting increasing numbers of students without having to purchase such admissions by large grants of financial aid. As a result of the representations described in the Official Statement, the five bondholder plaintiffs[1] in this action purchased $8.37 million of the bonds. The sixth plaintiff, ACA Financial Insurance Corp. (ACA), insured an additional $5.51 million.

Unfortunately, the representations in the Official Statement regarding the College s ability to attract larger numbers of lower cost students were entirely false. The increase in student enrollment was a one year blip, not a long term trend, and the Official Statement failed to include critical information that would have made it apparent that the College would not reach

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[1] ThreeThree of the bondholder plaintiffs, T. Rowe Price Tax-Free High Yield Fund, Three of the bondholder plaint
IncomeIncome Funds/Smith Barney Municipal High Income Fund and Dryden National Municipals Fund, Inc. (collectively,
thethe Institthe Institutional Bonthe Institutional Bondholders) are institutional investors who purchased the Bonds for mutual func
TheThe remaining bondholderplaintiffs, Lois and John Moore (the Moores) are a married couple The remaining bondholderplaintiffs, Lo
from Advest for their own account.

its enrollment targets. With regard to financial aid, the statements regarding financial aid commitments were simply false; aid awards for the present and upcoming years were increasing, not decreasing. The Offering Statement also failed to inform potential bond purchasers of the most serious financial problem facing Bradford, its inability to retain students who enrolled in its classes. The Offering Statement also misrepresented the Plan pursuant to which the College was going to turn around its financial performance. There was no such plan.

In this lawsuit, Plaintiffs seek to hold the trustees and officers of Bradford[2] and the underwriter of the bonds, Defendant Advest, Inc. (Advest) liable for the misrepresentations contained in the Official Statement. All Defendants have moved to dismiss all claims, but because the Plaintiffs have adequately pled the existence of the misrepresentations, even under enhanced pleading rules applicable to securities actions, and because of Defendants responsibility for those misrepresentations, Defendants motions must be denied.

FACTUAL BACKGROUND

Bradford was a small liberal arts college with an enrollment of less than 500 full time students for most of the 1990s. As noted above, starting in 1989, the College began to routinely operate in the red, running a deficit from its operations for every academic year between 1989 and 2000. Amended Complaint (AC), ¶ 60. By 1987, negative cash flow due to the recurrent annual operating losses had reached a critical point. The College s chief financial officer, Defendant Donald Kiszka informed the Board of Trustees in February 1987 that the College only

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[2] DefendantDefendant Joseph Short wasDefendant Joseph Short was theDefendant Joseph Short was the President of Br 1998.1998. Defendant Donald Kiszka was1998. Defendant Donald Kiszka was the1998. Defendant Donald Kiszka was the chief fina ViceVice President for Administration and Finance. Short and Kiszka are collectively refeVice President for Administration and Fin Defendants. Defendants. TheDefendants. The sixteen remaining individual defendants were trustees of Bradford at the time of the aandand through and through the announcement of the College s closing. They will be referred to herein collectively as the Trustee Defendants.

had enough cash to survive another 2 to 3 years. AC, ¶ 47. Only by enacting devastating and disruptive cuts and freezing salaries measures the officers and trustees were unwilling to make would there be sufficient cash to operate for five years. AC, ¶ 47. At the very same meeting Defendant Thomas, a member of the Board committee that oversaw the College s admissions admitted there was insufficient enrollment to assure the financial well-being of the College. AC, ¶ 52.

There were several sources for the College s financial problems. Perhaps most pressing was its continued inability to retain students. Only 40 % of its students graduated after matriculation, an extraordinarily high attrition rate. AC, ¶ 49. The New England Association of Schools and Colleges (NEASC), the College s accrediting body, found that student retention at Bradford was a crisis and the pre-eminent financial fact NEASC found that attrition was the major cause of Bradford s financial instability and gave the institution scant hope of fulfilling its aspirations. AC, ¶ 53.

Those students who did attend were given generous financial aid awards to entice them. The level of financial aid given to attract students had risen every year since 1989, and had reached a level well above average for comparable institutions in Massachusetts. AC, ¶ 56, 58. In the last full academic year prior to the bond offering, financial aid contributed by Bradford reduced its gross tuition by almost 50%. Official Statement (Exhibit A to the Amended Complaint) at A-14.[3] Effectively, Bradford was purchasing its admissions by awarding

[3] AsAs is customary in municipal bond offerings, the OffiAs is customary in municipal bond offerings, the Official describingdescribing the offering, which was signeddescribing the offering, which was signed by MIFA, the state agency formally issui describeddescribed the operations and financialdescribed the operations and financials of the institdescribed the operations and finan signedsigned by Short and Kiszka. Most of thesigned by Short and Kiszka. Most of the misrepresentations and otherssigned by Short and Ki and Plaintiffs will designate the appendix s pages as A-_

substantial financial aid.

For the 1997-98 school year, however, full-time enrollment jumped 13% and the school s matriculation rate for accepted students climbed from 25% to 34%. Official Statement at A-8. The Trustees and Administration at Bradford came to believe that if they could keep increasing enrollment, the College could generate sufficient revenues to survive. The Administration and the Trustees decided to build new dormitories and renovate existing ones to house the new students they hoped to attract. AC, ¶ 42. To finance the construction project, they turned to Defendant Advest to underwrite a tax exempt conduit financing through the Massachusetts Industrial Financing Agency (MIFA). Advest determined that $17.93 million was the maximum bonding capability of the College and agreed to underwrite the issue. AC, ¶ 45. The Trustee Defendants authorized the bond offering in February 1998 on the recommendations of Advest and Defendants Short and Kiszka, the current president and chief financial officer of the College. AC, ¶ 42. One Bradford Trustee, William Nofsker, resigned rather than approve the offering, on the ground that the college did not have sufficient enrollment to justify the expansion plan. AC, ¶ 50.

MIFA issued a $17.93 million revenue bond offering, dated as of May 1, 1998. The Official Statement described the offering and contained Bradford financial statements and an appendix that summarized the financials and provided operational information relating to Bradford. This section of the Offering Statement was signed by Defendants Kiszka and Short. Official Statement at A-18. Although issued by MIFA, a body politic of the Commonwealth of Massachusetts, the bonds were not an obligation of the Commonwealth or MIFA and were solely payable by Bradford. Offering Memorandum Cover, 1.

For potential investors, the critical questions necessary to evaluate the risks in the Bradford offering were whether the 1997 increase in enrollment was the beginning of a trend, as opposed to a random occurrence, and whether the school was subsidizing its increased enrollments by liberal financial aid awards. The Official Statement provided false and materially misleading information on both of these critical areas. With regard to admissions, after setting forth a table showing increases in the fall semester headcount from 484 full time equivalent students in 1993 to 584 students in 1997, the Official Statement, at A-13, stated:

> To attain the final goal of a balanced budget . . . the College is planning to increase enrollment to the level of at least 725 full-time students by fall 2000, with approximately 80% of those students living in campus facilities. As of April 3, 1998, applications received by the College to date total 879, an increase of more than 18% from April 3, 1997. The total of 879 exceeds total applications received for the fall 1997. . . .Based on this increase in applications, historic rates for conversion of applications into enrollments, the number of applications from freshmen and deposits received to date, the College believes that it can reach its goal of enrolling 225 new students for the fall of 1998 while increasing the quality of its students and reducing slightly the average amount of financial aid awards to such students from College funds.

While application numbers had technically risen, the Official Statement failed to disclose critical information investors needed to know to assess the realistic likelihood that the College would meet its goals. The College did not disclose that despite the increase in applications, the College s acceptance rate the percentage of applicants it deemed worthy of admission had sharply dropped, from 80% to 70%. The number of actual acceptances had also dropped. AC, ¶ 62. Perhaps even more importantly, the number of students who had committed to attend Bradford by actually paying a deposit the best indication of how many new students would actually enroll had declined by almost 20%. AC, ¶ 63.

Moreover, disclosing the increase in the number of applications, even if technically

correct, was misleading because of the College s decision to accept applications off the internet. The college knew that it was easier for web applicants to apply to several schools, making it less likely that such applicants would attend if accepted. The College knew that accepting web applications would artificially inflate the application numbers, but reduce the institution s acceptance and matriculation percentages. AC, ¶ 61.

If the College s disclosure of admission trends was misleading, its disclosures relating to financial aid were outright fraudulent. The Official Statement, at A-13, recited:

> [D]uring the 1997-98 academic year, the College estimates that financial aid will be reduced to 29.9% of student income versus 30.3% the previous year. This expected reduction is a result of change in methodology of aiding students with college-funded support versus additional loans funded by students and/or parents. The College s financial plan currently calls for a further reduction of financial aid spending for 1998-1999 academic year to 28.8% of student income.

The Official Statement was dated as of May 1, and not formally released until May 13, AC, ¶ 67,[4] near the end of Bradford s academic year, and long after the financial aid commitments to students attending the fall and spring terms had been made, as well as long after the college had determined the amount of student income it would receive for those two terms. AC, ¶ 56. Financial aid for the 1997-98 academic year actually consumed over 35% of student income, a 17% increase over the preceding year, not a reduction. Moreover, the College knew

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[4] TheThe Amended Complaint has inconsistent allegations regarding when the Official Statement was releasedreleased to the public. Paragraph 46 states that thereleased to the public. Paragraph 46 states that the bondsreleased to the public. I
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hashas occurred since the date ofhas occurred since the date of the financial has occurred since the date of the financial and statistical
eventevent has occurred which needs to be disclosed so that any information in the Official Statement will not be misleading
inin any material respect. Plaintiffs, of course, can amend their complaint to include this information and clarify the bond issuance date.

its budget figures were misleading because the Spring 1998 enrollment was less than budgeted, while the amount of financial aid committed was $250,000 more than budgeted. AC, ¶ 56.

The predictions for the forthcoming financial year were also false. Although the Official Statement credited a reduction in the amount of financial aid to a new methodology in calculating aid, such a plan was a fiction. There was no new methodology and the persons responsible for awarding financial aid were never advised or instructed to make any reductions or initiate changes. AC, ¶ 59. Indeed, the College s 1998-99 budget, which was submitted to the Trustee Defendants just two days before the official date of the bond offering, budgeted 31.3% of student income, not 28.8% of student income, on Bradford financial aid. AC, ¶ 57. Moreover, the actual financial aid commitments, which had already been made to the incoming students prior to the May 1 issuance, proved to be even higher, coming in again at 35% of student income. AC, ¶ 70.

The Official Statement did not alert investors to any kind of student retention problem at Bradford. Indeed, by only disclosing fall semester headcounts, instead of fall and spring semester, investors were unable to realize that Bradford s student retention problem was so severe that it lost significant numbers of students after just one semester. Spring semesters historically manifested a 7% attrition rate. AC, ¶ 54.

The Official Statement repeatedly referenced the College s plan to expand Bradford s enrollment and achieve financial equilibrium. But as determined by NESAC, who did its decennial accreditation review just a few months after the bond issuance, there was no such plan. There was no plan to deal with student retention, no plan to reduce financial aid, no plan to increase the student body to the target disclosed in the Official Statement and no plan to

determine why the College s budgeting process required it to go through annual budget crises. In short, NESAC concluded, there was no strategic plan. AC, ¶60.

The Bondholder Plaintiffs each purchased bonds as part of the initial offering from Advest. Advest sought insurance to assist with continuing sales of the bonds. It sent the Official Statement to Plaintiff ACA to review and ACA also had conversations with Kiszka. Based on the representations in the Official Statement and the conversation with Kiszka, ACA agreed to provide financial insurance for $5.51 million of the bonds. AC, ¶ 66, 67.

In the September after the bond issuance, the problems hidden by the Official Statement rose to the surface. The fall 1998 enrollment was substantially lower than projected by the College, with much of the problem attributable to upperclass attrition. AC, ¶ 68. Those who did attend received record amounts of financial aid. AC, ¶ 70. Financial aid was provided to 90% of the student body, as opposed to a disclosed rate of 80%, and the average recipient got $9,660, far more than 50% of Bradford s gross tuition. AC, ¶ 72. Although there was no longer a need for expanded dormitory space, Bradford did not cancel the project and return the unspent funds to the Bondholders. Instead, it continued to build dormitories for non-existent students elected to cut funding for student recruitment. AC, ¶ 71, 72.

By the fall of 1999, it was clear that the College could not achieve the enrollment required to pay the bonds. AC, ¶ 75. In November 1999, the College announced that it would cease operations at the end of the school year. AC, ¶ 76. The bonds were declared in default in January, 2000. AC, ¶ 78.

PROCEDURAL BACKGROUND

TheThe Institutional Bondholders and ACA filed a class action lawsuit relating toThe Institutional Bondho

bondsbonds in this Court within a year of the announcement of the school s intended close. AC, ¶bonds in this

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statutesstatutes as a defense to all the Plaintiffs claims[5]. Each. Each of the Plaintiffs, is a party. Each of the Plain

beneficiary of, the tolling agreements. AC, ¶ 79.

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allegingalleging violations of Rule 10b-5alleging violations of Rule 10b-5 and Section 10 of the Securities Excha

violationviolation of Section 20 of the 1934violation of Section 20 of the 1934 Act (Count II) and violation of Sec

of 1933 (Count III). of 1933 (Count III). At the sameof 1933 (Count III). At the same time, all of the plaintiffs

SuperiorSuperior Court alleging violations of the Massachusetts Uniform SecuritiesSuperior Court alleging violat

ConsumerConsumer Protection Act, and common law claims of fraud,Consumer Protection Act, and common law c

of fiduciary duty.

DefendantsDefendants moved to stay the state action pending resolution of the plaintiffs federal

securitiessecurities claims in this Court and on January 18, 2005 the Superiorsecurities claims in this Court a

motion.motion. Consequently, on January 21, 2005 the Plaintiffs amended their complaint to addmotion. Consec

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[5] CopiesCopies of the tolling agreements are attached asCopies of the tolling agreements are attached as Exhibits 1 and In Support Of Their Opposition To Defendants Motions To Dismiss.

aa party and to add thea party and to add the state law causes of action previously only brought ina party and to ad

IVIV through VIII of the Amended Complaint. With the exception of those paragraIV through VIII of the Am

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compcomplaintcomplaint complaint on the same date. The Amended Complaint, however, was filed before th

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of the complaint.[6]

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regardingregarding what the Defendants and Bradford did (and did not do) in connection regarding what the De

ofof the bonds and the Official Statement. Given Rule 15 s mandate that amendmentof the bonds and the Offic

shouldshould beshould be liberally allowed and the acknowledged Byzantine complexity of theshould be liberally

requirements,requirements, see <u>In re NumberIn re Number Nine Visual Technology Corp. Securities Litigation</u>, 51

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[6] ThisThis explains why the Court has three motions to dismiss filed by two sets of defeThis explains why the Court l BecauseBecause the Amended Complaint did not alter the allegatioBecause the Amended Complaint did not alter the allegations relat thethe Defendants would respond to the Amendedthe Defendants would respond to the Amended Complaint, butthe Defendants would r motionmotion to dismiss on file, and would only have tomotion to dismiss on file, and would only have to address the recently added sta AmendedAmended Complaint. Advest, whichAmended Complaint. Advest, which had not filed a responsive pleading or motion to dis state and federal claims in its motion to dismiss the Amended Complaint.

1,1, 27,1, 27, n. 22 (Number Nine)(Young, J., noting the gamesmanship required to)(Young, J., noting the g

aa securities claim is now reminiscent of pre-Federal Rules pleading practices),a securities claim is now reminisc

given at least one opportunity to repair any pleading deficiencies.

ARGUMENT

I. PLPLAIPLAINTIFFS PLAINTIFFS HAVE SUCCESSFULLY ALLEGED VIOLATIONS O SECURITIES EXCHANGE ACT OF 1934 AGAINST ALL DEFENDANTS

SevenSeven of the eight counts Plaintiffs have brought aSeven of the eight counts Plaintiffs have broug omissionsomissions found in theomissions found in the Official Statement.[7] Defendants assert that each of Defend thethe Plaintiffs have failed to plead the existencethe Plaintiffs have failed to plead the existence of a materially r law,law, and that evenlaw, and that even if such statements or omissionslaw, and that even if such statements or om applicableapplicable pleading standards that attach to these counts. Tapplicable pleading standards that attac standardstandard applies to Countstandard applies to Count I, Plaintiffs claims for violation of § 10 of the 1934 A underunder the Act. Consequently, if Plaintiffs establish thatunder the Act. Consequently, if Plaintiffs establish ofof action against the Defendants under Count I,of action against the Defendants under Count I, there sh successfullysuccessfully plead the misrepresentation elemensuccessfully plead the misrepresentation element Plaintiffs will not repeat the misrepresentation analysis in those sections of this memorandum.

PlaintiffsPlaintiffs allege five categories of misrepresentation in the Official Statement: (1) misrepremisrepresentationmisrepresentation of expected enrollment; (2) misrepresentation of financial aid award disclosuredisclosure anddisclosure and misrepresentation of student retention problems; (4)disclosure and misrep ofof a strategic plan and (5) misrepresentaof a strategic plan and (5) misrepresentation of the of a strategic p

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[7] TheThe only exception is CoThe only exception is Count VIII,The only exception is Count VIII, against the Truste fiduciaryfiduciary duties owed to the creditors offiduciary duties owed to the creditors of Bradfordfiduciary duties owed to the credito Bradford Defendants motion to dismiss this count.

improvementsimprovements being financed by the bonds.[8] After setting forth the standards for evaluating Aft sufficiencysufficiency ofsufficiency of the Plaintiffs pleading, Plaintiffswillsufficiency of the Plaintiffs pleading, to determine whether they have successfully statedto determine whether they have successfully stated the existe statement,statement, and whether, for each alleged misrepresentation, there arestatement, and whether, for each all aa strong inference ofa strong inference of scienter.a strong inference of scienter. Plaintiff will then examine the toto their 1934 Act claims: whether Plaintiffs have sufficiently alleged lto their 1934 Act claims: whether sufficientsufficient facts are alleged to tie the specific defendantssufficient facts are alleged to tie the specific defen regardregard to the Officer and Trustee Defendants, whether Plaintiffs havregard to the Officer and Trustee De person liability under § 20.

A. TheThe Standards ForThe Standards For Determining Whether Plaintiffs Have Adequately PledTh Action For Violating Rule 10b-5

EvenEven in connection Even in connection wiEven in connection with a motion to dismiss a securities ofof Rule 12(b)(6) jurisprudence still guide this Couof Rule 12(b)(6) jurisprudence still guide this Court. complaintcomplaint as true, and if, under any theory, the complaint as true, and if, under any theory, the allegat inin accordance with the law, we must deny the motion in accordance with the law, we must deny the mot SecuritiesSecurities Litigation, 106 F. Supp. 2d 161, 165 (D. Mass. 2000), citing 106 F. Supp. 2d 161, 165 (D. Ma 1414 F.3d14 F.3d 697, 700 (1st Cir. 1994). All reasonable inferences must be granted in favor of the plaintiff. In re Raytheon Securities Litigation, 157 F. Supp. 131, 145 (D. Mass. 2001).

ToTo state a cause of action under To state a cause of action under Rule 10To state a cause of ac defendantdefendant made a false statement or omitted a material fact, with scientedefendant made a false st

[8] TheThe AmendedThe Amended Complaint does devote aThe Amended Complaint does devote a subsection, ¶s 47-4 diddid notdid not disclose the financial crisis recognized by the Trusteedid not disclose the financial crisis recognized by the Trustee and that Defendants were obligated to disclose the content of that meeting in the Officialthat Defen dants we re obligated to disclose the c ont however, however, the Officers and Trustees recognition that Bradford washowever, the Officers and Trustees recognition that Bradfo cash to op erate is highly relevant evid ence of scie nter.

reliancereliance upon the statement or omission caused the plaintiffs injreliance upon the statement or omissio
9393 F.3d 987, 992 (1st Cir. 1996). Claims unde93 F.3d 987, 992 (1st Cir. 1996). Claims under 93 F.3d 987
pleadingpleading specificity requirements established by Fed.R.Civ.P. 9(b) and the Privpleading specificity
LitigationLitigation Reform Act, 15 U.S.C. § 78u-4.Litigation Reform Act, 15 U.S.C. § 78u-4. Aldridge v. A. T. C
2002)(Aldridge) .). To meet these re). To meet these requir). To meet these requirements, the pla
misleadingmisleading statement or omission, including its time, place and content. In Re PerkinElmer, Inc.
SecuritiesSecurities Litigation, 286 F. Supp. 2d 46, 51 (D., 286 F. Supp. 2d 46, 51 (D. Mass. 2003). Plaintiffs must f
supportsupport for the claim that the statements or omissions were fraudulesupport for the claim that the statem
oror omissions were misleading. Aldridge, 284 F.3d at 78. Plaintiffs are also r, 284 F.3d at 78. Plaintiffs are
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NotwithstandingNotwithstanding the specificity requirements established by Rule 9(b) and the PSLRA, the PlNotw
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1999).

HereHere bothHere both sets of DefendantsHere both sets of Defendants assert that the alleged misreprese
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incomplete,incomplete, or misleading in light of the undisclosed information. Gross v. Summa Four, IncGross v

F.3dF.3d 987, 992 (1st Cir. 1996). In general, the materiF.3d 987, 992 (1st Cir. 1996). In general, the materiali

ofof fact that should normally beof fact that should normally be left to jury ratherof fact that should normally be le

Lucia v. Prospect St. High Income Portfolio, Inc., 36 F.3d 170, 176 (1st Cir. 1994).

WithWith these principlesWith these principles in mind the Court can analyze the sufficiency of the Plain

allegations.

B. Defendants Defendants Disclosure of Information Regarding Future EnrollmenDefendant Misleading and Plaintiffs Have Sufficiently Alleged Necessary Scienter.

1. FailureFailure to disclose Bradford s plummeting acceptFailure to disclose Bradford s numbernumber of deposits was misleading, particularly innumber of deposits was misle disclosure of an increased number of acceptances.

AsAs notedAs noted above, one of the critical issues for any potential purchaser of Bradford s As noted

waswas whether the fall 1997 increase in enrollment was a fluke or the beginning of a trend that would

allowallow Bradford to generate operational surpluses. Had the Official Statement merely stated the

College sCollege s goal to increase enrollment to 725 students, including 225College s goal to increase enrollment

academicacademic year, it is arguable that such forecasting academic year, it is arguable that such forecasting

statementsstatements about a company s futurestatements about a company s future thatstatements about a com

especiallyespecially whenespecially when accompanied by a disclaimer that the College might notespecially wh

e.g. In re Stone & Webster Securities Litigation, 253 F. Supp. 2d 102, 117 (D. Mass. 2003).

TheThe The OfficialThe Official The Official Statement,The Official Statement, The Official Statement, how

statistics some disclosed, some undisclosed that purportedly confirmed the College s forecast.

> AsAs of April 3, 1998, applications received by the College to date total 879, anan increase of more than 18% from April 3, 1997. The total ofan increase of more than 18% fro totaltotal applications received for the fall 1997. . . .Based on this increase in applications,applications, historicapplications, historic ratesapplications, historic rates for conve thethe number ofthe number of applications from freshmenthe number of applications from freshm

> College believes that it can reachCollege believes that it can reach its goal ofCollege believes that thethe fathe fallthe fall of 1998 while increasing the quality of it students and reducing slightlyslightly the averageslightly the average amslightly the average amount of financial aid a College funds. Official Statement, at A-13. (emphasis added)

AsAs required by the PSLRA, the Complaint describes why this discAs required by the PSLRA, t misleading.misleading. To assert thatmisleading. To assert that the College s target is obtainable,misleading. T currentcurrent and statisticcurrent and statistics known (or current and statistics known (or knowable) by applicationsapplications (which is disclosed);applications (which is disclosed); (2) theapplications (which is disclo (wh(which(which is disclosed, but is misleading for reasons that are not disclosed), and (3) the (which is discl depositsdeposits received to date (which is not disclosed).deposits received to date (which is not disclosed). Of th thethe most reliable indicator of enrollment for the upcomingthe most reliable indicator of enrollment for the upco toto the College to reserve a place are most likto the College to reserve a place are most likely to attendto the C usedused to repauused to repay the bonused to repay the bond debt. But the number of deposits received at the t downdown by 20% from a year earlier[9], AC, ¶ 63, a very strong indication that e, AC, ¶ 63, a very strong indi would not increase, but fall. Which is what occurred, AC, ¶ 68.

TheThe historic rate of conversion of applThe historic rate of conversion of appliThe historic rate disclosed)[10] might be relevant if might be relevant if there was might be relevant if there was reason to belie However,However, the College knew, but failed to disclose, that the acceptaHowever, the College kne dramatically,dramatically, from 80% to below 70%. AC, ¶ 62. This was not becdramatically, from 80% to belo

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[9] TheThe DefendaThe Defendant and OffiThe Defendant and Officer Defendants complain that ¶ 62 does not specify reductionreduction applies to. It is obviousreduction applies to. It is obvious from the context of the Amended Complaint thatreduction ap fromfrom the prior yearfrom the prior year at the same time. These figuresfrom the prior year at the same time. These figures come from Ad ofof business by Bradford and circulated to, among others, the president and CFO.of business by Bradford and circulated to, among others such detail in an amended pleading.

[10] TheThe conversion rate couldThe conversion rate could be calcuThe conversion rate could be calculated from the fig onon A-8 of the Official Statement.on A-8 of the Official Statement. They ranged from a low of 19.7% for the fall of 1994 toon A-8 of the year.year. Putting aside theyear. Putting aside the extraordinary year of 1997-98, the historic average rate was 20.2%. Takingyear. Puttir into account, the average was 21.6%.

moremore selective due to increased competition for available spots. Even thoughmore selective due to incre intentionallyintentionally trying to increase enrollment it was actually accepting less students. AC,intentionally quality of student applying had declined. AC, ¶ 62.

TheThe one figure the College fully disclosed, the number of applications,The one figure the College fully relevantrelevant number for evaluating future enrollment. This was clear from the Admissionsrelevant number for e onon page A-8 of the Official Statement. The year Bradford received the feon page A-8 of the Official Stater currentcurrent year, itcurrent year, it had the most enrollments and the highest headcount. Thecurrent year, it had applications,applications, 1994, it had the lowest rate ofapplications, 1994, it had the lowest rate of converting ap toto 27.1% for 1997). to 27.1% for 1997). Yet not only didto 27.1% for 1997). Yet not only did Bradford tout the aa securities violation, but the Complaint properly alleges that this statistic was misleaa securities violation, inaccinaccurateinaccurate because the application numbers were not comparable to prior years without finacc disclosure.

TheThe The AmendedThe Amended The Amended ComplaintThe Amended Complaint The Amended Com toto prior years because Bradford had begun to accept and count standardized web applications,to prior years b chanchangechange the College knew artificially inflated the application numbers. AC, ¶ 62. Web apchange the appliedapplied to more schools because of the ease in applyingapplied to more schools because of the ease in apply anyany particular school to whichany particular school to which they applied.[11] AC, ¶ 62. Defendants dispute AC, applicantsapplicants leads to a material change in the acceptance or matriculation ratapplicants leads to a m heightenedheightened standard applied to federal securities cases,heightened standard applied to federal s reasonable inferences in the Plaintiffs favor. It is a reasonable inference thatreasonable inferences in the Plainti

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11 AA web applicant who applies, and is accepted to, ten schools will reject nine. A paperA web applicant who applies, a onlyonly applies, and is accepted to, five schools, will only reject four. only applies, and is accepted to, five schools, will only reject four. W increases,increases, its matriculation rate for accepted applicants will almost cerincreases, its matriculation rate for accepted applicant application applicants into enrollees are much longer.

toto a school to a school with a push of a to a school with a push of a computer key have less commitment tha effort to obtain and return a paper application.

Moreover,Moreover, Defendants ignore the alMoreover, Defendants ignore the allegatioMoreover, D studentsstudents who submittedstudents who submitted web applications were less likely to attend, thatstudents raterate worate would decline (which it did), and that it knew counting web applications artificially inflarate w applicationapplication numberapplication numbers.[12] If the If the College itself thought this statistic was not admissions,admissions, it should haveadmissions, it should have never admissions, it should have never bee betweenbetween the two applicationbetween the two application figures. Thus,between the two application figure toto establish thatto establish that every element thatto establish that every element that allegedly supported the C meet its September 1998 goal was misleading.

DefendantsDefendants assert that PlaintiffsDefendants assert that Plaintiffs have not establish that the un statisticsstatistics are material because there arestatistics are material because there are nostatistics are material b thethe College had materially significantthe College had materially significant numbers of applications and accep DefendDefendantsDefendants Defendants whoDefendants who Defendants who mDefendants who made misleadi ofof applications already received and the College s acceptance rate. The fact that Defendanof application partiallypartially disclosed this information voluntarily demonstrates that theypartially disclosed this information v werewere material in assessing whetherwere material in assessing whether Bradwere material in assessing v semestsemester.semester. semester. Indeed, the Official Statement presents this information as if these statistic

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[12] TheThe Trustee and Officer Defendants question Plaintiffs source for these allegations. AlthoThe Trus tee and O ffi PlaintiffsPlaintiffs are not required to plead evidencePlaintiffs are not required to plead evidence, these allegaPlaintiffs are not requir presentationpresentation by Bradford admissions personnel explaining to the Board of Trustees presentation by Bradford admissions person TheThe memorandum describes the softness of internet applications, how half complThe memorandum describes the softness includedincluded in the application count when a paper equivalent had not historicaincluded in the application count when a paper eq thesethese changes from historical treatment had been introducedthese changes from historical treatment had been introduced by the ne SeptemberSeptember 1997 prior to the bond issuance.Septemb er 1997 prio r to the bond issuance. September 1997 prior to the bond issua artificially increases numbers. These facts can be included in an amended pleading.

material to this important factor.[13]

DefendantsDefendants contend that theyDefendants contend that they cannotDefendants contend that t

TheyThey relyThey rely on the First Circuit s opinion in Shaw v. Digital Equipment, Corp.,, 82 F. 3d 1194, 1209

(1st Cir 1996) (Shaw), asserting that its holding makes it plain that Bradford had no obligation to

disclosedisclose its forward looking projections or opinions. But Shaw confirms that even if confirms that eve

hadhad no obligation to disclose the projections,had no obligation to disclose the projections, once they had volunt

ifif there is no reasonable basis for the projection. 82 F. 3d at 1211, n. 21.if there is no reasonable basis for the p

PlaintiffsPlaintiffs raise an allowable inference that there was no reasonable basis for the prediction,Plaintiffs raise

Defendants did not act in good faith. See Section I.B.2, infra.

ItIt is equally well established that (w)hen a corporation doesIt is equally well established that (w)hen a

bebe voluntary or required--there is a dutybe voluntary or required--there is a duty to make it complete and accurate

Inc.,., 814 F.2d 22, 26 (1st Cir.1987). Disclosed facts may not be so., 814 F.2d 22, 26 (1st Cir.1987). Disclos

Backman v. Polaroid Corp., 910., 910 F.2d 10, 16 (1st Cir.1990) (en banc) (quoting., 910 F.2d 10, 16 (1st Cir.19

SulphurSulphur Co., 401 F.2d 833, 862 (2d, 401 F.2d 833, 862 (2d Cir.1968), *cert.cert. denied,* 394 U.S. 976 (1969

selectiveselective disclosure of admissions data could clearly be found to mislead; it publicized only the

favorable statistics, while concealing the more relevant unfavorable information.

MoreMoreover,Moreover, disclosures which appear to be couched as a projection, frequently make

actionableactionable represeactionable representations about the present. A prediction about the future contains

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[13] DefendantsDefendants fail to consider the well-known admissions cycle for U.S. collDefendants fail to consider ProspectiveProspective freshmenProspective freshmen file their applications in theProspective freshmen file their applications in the fal inin the winter and early spring. By May 1, the date ofin the winter and early spring. By May 1, the date of the Official Statement, stud toto guarantee their spaces. Consequently, by Mayto guarantee their spaces. Consequently, by May 13, the date theto guarantee their spa onlyonly have made its decisions on virtually all of itsonly have made its decisions on virtually all of its applications, but it would have re Thus,Thus, the admissions information available on MayThus, the admissions information available on May 13 (or May 1) was highlyTh upcomingupcoming teupcoming term. If the Court cannot take judicial notice of these facts, Plaintiffs can set them forth in an ame pleading.

implicitimplicit factimplicit factualimplicit factual assertions: (1) that the statement is genuinely believed, (2) th basis for that belief, and (3) the speaker is not aware ofbasis for that belief, and (3) the speaker is not aware of an undermineundermine theundermine the accuracy of the statement. HelvigHelvig v. Vencor, Inc. 251 F.3d 540, 557 InIn reIn re Sepracor, Inc. Securities Litigation, 308 F. Supp. 2d 20, 33-34 (D. Mass. 2004). For, 308 F. Sup reasonsreasons described above, the selective disclosure described is actionablereasons described above, the selec thatthat undermined the accuracy of the statemthat undermined the accuracy of the statementhat undermined th therethere was no reasonable basis for belief in light of the most recent, most relevantthere was no reason statistics.statistics. Further,statistics. Further, for the reasons setstatistics. Further, for the reasons set forth below, a thethe authors of thethe authors of the disclosurthe authors of the disclosure did not genuinely believe th ComplaintComplaint does not allege misrepresenComplaint does not allege misrepresentation witComplaint d instead alleges that hard present facts were either not disclosed or misleadingly disclosed.

ThisThis claim s focus on the failure to properly disclose preThis claim s focus on the failure to pro invocationinvocation of the bespeaks caution doctrine. That defense precludes liability foinvocation o informatinformation,information, such as forecasts, estimates, projections and opinions when such statemen accompaniedaccompanied by cautionary disclosures thataccompanied by cautionary disclosures that adequatelya Shaw,, 82 F. 2d at 1213., 82 F. 2d at 1213. Here,, 82 F. 2d at 1213. Here, Defendants claim Plaintiffs we enrollmenrollmentenrollment disappointments because directly following the enrollment disclosure, the Offi StatementStatement also stated failure to achieve thisStatement also stated failure to achieve this enrollmeS adversely affect the College s ability to reach Financial Equilibrium.

BuButBut as Shaw ma makes plain, the bespeaks caution doctrine has no application to a statement whichwhich has the appearance ofwhich has the appearance of a projection, but also implicitly makes a false statem

> ToTo the extent plaintiffs allege that the . . . statement encomTo the extent plaintiffs alleg represerepresentatrepresentationrepresentation of *present fact*, and that such a representation wa

> misleadingmisleading when made, the surroundingmisleading when made, the surrounding caution renderedrendered the statement immaterial as a matter of law. *See Harden* [v. RaRaffensperger],], 65 F.3d [1392] at 1405-06 (explaining that the be], 65 F.3d [1392] at 140 cautioncaution caution doctrine cannot render misrepresentations of hard fact nonactionable]

8282 F.3d at 1213 (emphasis in original) See also In re Number Nine VisuIn re Number Nine Visual TIn r SeSecuritiSecuritiesSecurities Litigation 51 F. Supp. 2d 1, 19 (D. Mass. 1999)(Number Nine) (The besp caution defense is inapplicable where,caution defense is inapplicable where, as here, the plaintiffs challenge th regardingregarding *presepresent factpresent facts* as opposed to forward-looking statements , citing Shaw (original)).

TheThe projections of the fall enrollment are not immaterialThe projections of the fall enrollment are not in havehave set forth sufficient facts explaining why the statement was false and misleading. Ashave set forth suffic below, they can also make a strong showing of scienter.

2. TheThe Amended CoThe Amended ComplaintThe Amended Complaint The Amended Com expected fall enrollment

LiabilityLiability under Section10(b) and Rule 10b-5 requires Liability under Section10(b) and Rule 10 intentintent to deceive, manipulate or defraud. ErnErnst & ErnstErnst & Ernst v. Hochfelder, 425 U.S. 185, 1 (1976).(1976). This can(1976). This can be pled by allegations that give rise to an inference that defendants said(whilewhile believing or knowingwhile believing or knowing another. In re Segue Software, Inc. Securities Litigat 2d2d 161, 1662d 161, 166 (D. Mass. 2000). Plaintiffs must show either that the defendants2d 161, 166 (D. Mass. to defraud, or that they acted with a high degree of recklessness. Aldridge, 284 F. 2d at 82.

ToTo meet the heightenedTo meet the heightened pleadingTo meet the heightened pleading requirements forthforth sufficient facts that give rise to a strong inference of scienter.forth sufficient facts that give rise to a st notnot be irrefutable. Cabletron, 311 F.3d at 38. Plaintiffs need not foreclose all other characterizationcharacterizations of fact, as the task of weighingcharacterizations of fact, as the task of weighin

Aldridge, 284 F. 3d at 284 F. 3d at 82. Even 284 F. 3d at 82. Even when evaluating the strength of Plain Plaintiffs are still entitled to have all reasonable inferences drawn in their favor. Id.

DefendantsDefendants assert that the Plaintiffs have not sufficiently plead scienterDefendants assert that th traditionaltraditional badges of scienter, such as insider trading or personatraditional badges of scienter, such financing,financing, are not present.financing, are not present. financing, are not present. To require such evidenc securitiessecurities fraud wsecurities fraud with regsecurities fraud with regard to any bond issuance by a non- organizationsorganizations doorganizations do not issue equity to shareholders. The First Circuit, however, has formulaformula for pleading scienter, preferring toformula for pleading scienter, preferring to rely on a fact-speci case. Cabletron, 311 F.3d at 38.

However,However, in theHowever, in the leading First Circuit case concerning scienter pleading underH GreebelGreebel v. FTPGreebel v. FTP Software, Inc., 194 F.2d, 194 F.2d 185, 196 (1st Cir. 1999), the Court of A certaincertain fact patternscertain fact patterns that are relevant to demonstration of scienter, at least two of which here:here: the divergencehere: the divergence betweehere: the divergence between internal reports and externa currentcurrent factualcurrent factual information before making statements. Here, of course,current factual inform pronouncedpronounced optimism in meeting the enrollmentpronounced optimism in meeting the enrollment targe reports,reports, which indicated that the College would do significantly worse treports, which indicated that th pronouncementpronouncement was also at odds with the current figures posspronouncement was also at odds w Statement.

EvenEven more probative of scienter, however, is the nature of the sEven more probative of scienter, summarizedsummarized above, thesummarized above, the officers, trusteessummarized above, the officers, trustee relevancerelevance to the fall enrollment numbers. Onlyrelevance to the fall enrollment numbers. Only one of th positive;positive; yet it was the only one disclosed. Not only were the two negative statistics (acceptance

raterate and number of deposits) not disclosrate and number of deposits) not disclosedrate and number of depos thethe enrollment target couldthe enrollment target could be met. If the officers, Trustees and underwriters were givegive prospective investors insight as to the likelihood of Bradford achieving its goal, it is highly doubtfuldoubtful they would have publidoubtful they would have publicdoubtful they would have publicized statistics.statistics. On the other hand, if they were attempting to manipulate investors and statistics. O weaknessesweaknesses that would likely discourage investors fromweaknesses that would likely discourage inve preciselyprecisely in theprecisely in the manner adopted in the Official Statement. The deliberate concealment of relevantrelevant statistics while disclosing more favorable, but untrustworthyrelevant statistics while disclosing thatthat the Defendathat the Defendants did not actthat the Defendants did not act in good faith. And considerationconsideration that the applicationconsideration that the application data itself was misleading becaus differences between the way applications were obtained in prior years.

TheThe fact that Defendants included and focused upon the appThe fact that Defendants included and Statement,Statement, Statement, knowingStatement, knowing Statement, knowingthatStatement, knowingthat Stat tthethe number of applications, AC, ¶ 62, is also strong evidence of scienter. Knowingly comparing stastatisticsstatistics from two periods without disclosing changes in the method of compiling set dastatistics fro make the comparison dubious is plainly evidence of intent to deceive or manipulate.

TheThe Court caThe Court can also taThe Court can also take into consideration the subjective knowled Officers,Officers, as evidenced by the February 1987 TrOfficers, as evidenced by the February 1987 TrusteOff ofof the authors ofof the authors of the Official Statement, Kiszka, informed the Board, thatof the authors of the O onlyonly survive two or three more years if noonly survive two or three more years if nothing changeonly su AmendedAmended Complaint, or the disclosures inAmended Complaint, or the disclosures in the Official Stateme

StatementsStatements gives any indication that the financial situation hadStatements gives any indication that the

BradfordBradford defendants knowledge of the precarious financial condition, and their failure to make

disclosuresdisclosures (or to check the accuracy of disclosures actually madisclosures (or to check the accuracy

loanloan funds to that institution, is information the Court can and should consider in weighing whether

their conduct was knowing or reckless.

AlthoughAlthough none of the BradfordAlthough none of the Bradford trusteesAlthough none of the Brad

issuance,issuance, their knowledge that the school s survival was onissuance, their knowledge that the school s surv

inin assessin assessing sciin assessing scienter. Several cases have recognized that the serious deterioration of

financialfinancial health is a motive for the alleged fraud and should befinancial health is a motive for the alleged

Cabletron,, 311 F.3d at 39; Aldridge,284 F.3d at 83; NathensonNathenson v. Nonagen, Inc., 267 F.3d, 267 F.3d 40

(5th(5th Cir. 2001). This is(5th Cir. 2001). This is particularly(5th Cir. 2001). This is particularly the case whe

financialfinancial decline from investors. Evenfinancial decline from investors. Even if they would not directly p

CourtCourt can take into consideration that the Bradford Defendants had invested subsCourt can take into considera

professionalprofessional commitment to the College. Itprofessional commitment to the College. It is not surprisin

trytry to try to finance a project they viewed as the only viable alternative to liquidation, a stry to finance

steadfastlysteadfastly refused tosteadfastly refused to consider. AC, ¶steadfastly refused to consider. AC, ¶ 73.

watchwatch would be a personal and professiowatch would be a personal and professionwatch would

manipulatingmanipulating the information provided to investors whomanipulating the information provided to inv

Taken together, all of this conduct is more than adequate evidence of scienter.

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[14] TheThe Financial Statement for 1997, attached as The Financial Statement for 1997, attached as AppendiThe Fin releasedreleased seven months after the February 1997 trustees meeting does not indicate any change in the financial condition of the College. Although net assets increased by $361,600,of the College. Although net assets increased by $361,600, more than $1.2 unrealizedunrealized gain on investment assets, a surplus which could disappear in short noticeunrealized gain on investment assets, a surpl investmentinvestment gains and gifts of more than $1.35 million, Bradford s operations lost $4.5 million. Appendixinvestment gains an did things look any better in the current year, in which the operational loss was about the same amount.

C. Defendants Defendants Defendants DisclosureDefendants Disclosure Defendants Disclosure ofI Was Misleading and Plaintiffs Have Sufficiently Alleged Necessary Scienter.

1. TheThe stated expectationThe stated expectation that financial aid would likely decrease w mislemisleading,misleading, particularly in light of the fact that financial aid awards we actually increasing.

TheThe Official Statement devotesThe Official Statement devotes substantial attention to Bradford sThe its students. See, e.g. Officialits students. See, e.g. Official Statement at A-10. The tables on page A-10 show t ofof such awards increased every year of such awards increased every year bof such awards increased every yea itit clear that the Bradford s grit clear that the Bradford s grants of finit clear that the Bradford s grants of f incomeincome it would otherwiseincome it would otherwise have earned. MIFA s disclosure notes that the aware studentsstudents (along with 10students (along with 10 other factors, such as competition , legislation andstude thatthat will affect Bradford s future revenue and expenses. that will affect Bradford s future revenue and expe Statement makes it clear that financial aid awards are material to Bradford s finances.

InIn at least three locations,In at least three locations, the Official Statement declares thatIn at least three l willwill continue to take steps to reduce thewill continue to take steps to reduce the amount of aid awarded andw comparedcompared tocompared to total student revenue.[15] The anticipated reduction is specifically stated to be th

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[15] On page A-13 the Official Statement states:

> [D]uring[D]uring the 1997-98 academic ye ar,[D]uring the 1997-98 academic year, the College estimates that financial[I toto 29.9% of student income versus 30.3% the previous year. This expto 29.9% of student income versus 30.3% th resultresult of change in methodology of aiding students wiresult of change in methodology of aiding students v additional loans funded by students and/or parents. The College s financialadditional loa ns funded by studen ts and/or callscalls forcalls for a furthercalls for a further reduction of financial aid spending for 1998-1999 academic year to 28.8 of student income.

TwoTwo paragraphs later, as part ofTwo paragraphs later, as part of its discussionTwo paragraphs later, as part of its discussion thethe Official Statement states that based on an increase in applications, historic conversion rates and the number of depositsdeposits received, the Collegedeposits received, the College believes it can meet its fall enrollment goal while. . . reducing slightly of financial aid awards to such stude nts from C ollege fund s.

AndAnd on page A-17, the OfficialAnd on page A-17, the Official Statement states: The strategic initiatives of the CollegeAnd andand for the next three years are. . . 3. To increaseand for the next three years are. . . 3. To increase net tuition revenues by close manage enrollmen t, prudent use of financial aid and setting o f tuition and fee levels to attract stu dents.

ofof a new program to redof a new program to reduce aid, Offiof a new program to reduce aid, Official Stateme two year old initiative. Official Statement at A-17.

TheThe Amended Complaint plainly pleadsThe Amended Complaint plainly pleads sufficient facts to demo ComplaintComplaint alleges that the actual finaComplaint alleges that the actual financial aiComplaint alle $250,000 higher than the budget referenced in the disclosure and that the actual$250,000 higher than the budget toto student income was 35%,to student income was 35%, not 29.9%--an increase of 14% instead of a 1.3% decre

ContraryContrary to Defendants assertion, the ComplContrary to Defendants assertion, the ComplaiC werewere detewere determined later,were determined later, and that Plaintiffs are trying to hold them liable f targets. The Complaint alleges that the actual numbers were known and knowable at the time the OfficialOfficial Statement was published because in May,Official Statement was published because in May, just se (and(and only(and only a week or two before the end of the academic term)(and only a week or two before the end aidaid it had given to its students for theaid it had given to its students for the school yearaid it had given to its stu AC,AC, ¶ 56. UnlikeAC, ¶ 56. Unlike a traditional business, whichAC, ¶ 56. Unlike a traditional business, which oror fulfillmentor fulfillment expenses seven weeks before its or fulfillment expenses seven weeks before its fisca studentstudent revestudent revenstudent revenue (and incurred all of its student aid expense) when studen SeptSeptemberSeptember and January. AC, ¶ 56. By May, the College had real numbers,[16] not obsol not obsol

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[16] EvenEven if theEven if the Amended Complaint didEven if the Amended Complaint did not allege Bradford s receip ofof the discrepancy and the importance of the financial dataof the discrepancy and the importance of the financial aid data to reasonablyreasonably infer the current falsityreasonably infer the current falsity of thereasonably infer the current falsity of the projectio materialmaterial falsity regarding Digital s representationmaterial falsity regarding Digital s representation that a restructuring reserve wa monthsmonths later Digital did substantially increase its restructuring reservmonths later Digital did substantially increase its restruc naturenature ofnature of the problems facingnature of the problems facing Digital, defendants must have known about the forthcoming cha stated that the reserve wasstated that the reserve was adequate. 82 F. 3d at 1212-1214. See also Shaw, 82 F. 3d 82 F. 3d at 1210-11(rea plaintiff splaintiff s unsubstantiated allegation that defendant knew about substantialplaintiff s unsubstantiated allegation that defendan announcement)announcement) Cooperman v. Individual, Inc.,, 171 F.3d 43,, 171 F.3d 43, 48 (1st Cir. 1999)(reasonable to infer that Def knowknow about undisclosed dispute between CEOknow about undisclosed dispute between CEO andknow about undisclosed dispute untiluntil 4½ months later). See generally Number Nine, 51 F. Supp. at 14-17. (Liability f, 51 F. Supp. at 14-17. (Liability for , 51 F statementstatement basedstatement based solely on disclosure of problem at a later date when problemstatement based solely on disclosure iitsits existence its existence at the time of the misleading statement; cannot infer knowledge of inventory valuation merely from an announcementannouncement eight months later, but knowledge of other types of corporatannouncement eight months later, but know

numbers, to base its disclosures upon.[17]

OnceOnce again, because Plaintiffs claim rests oOnce again, because Plaintiffs claim rests onOnce again, l

toto futo future projections, the bespeaks caution doctrine does not apply. Shaw, 82 F.3d at 121, 82 F.3d at 121

NumberNumber Nine Visual Technology Corp. Securities Litigation, 51 F. 51 F. Supp. 2d 1, 51 F. Supp. 2d 1, 19 (

Here,Here, the disclosure of the budget projections implicitly stated that BradfordHere, the disclosure of the budg

ofof facts that contradicted theof facts that contradicted the budgetof facts that contradicted the budget numbers

data,data, and this was not disclosed todata, and this was not disclosed to potential investors. Further, the bespeaks c

applyapply bapply because there was no particularized disclaimer regarding financial aid. In re Focus

EnhancementsEnhancements Securities Litigation, 309 F. S, 309 F. Supp., 309 F. Supp. , 309 F. Supp. 2d., 309 F. Sup

toto investors insuffito investors insufficient to to investors insufficient to establish bespeaks caution defens

relatedrelated in subject matter and strong in tone). The Official Statement does not warn that financial aid

awards,awards, which wouldawards, which would awards, which would appear to be within the complete contr

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shortershorter than eight months.) Here, sevenshorter than eight months.) Here, seven weeks before the end of the fiscal year andshorter th itit is eminently reasonable toit is eminently reasonable to infer that defendantsit is eminently reasonable to infer that defendants knew (or percentagespercentages were higher than Bradford s budget, even if those figures were nopercentages were higher than Bradford s bu of Bradford s year end financials.

[17] Moreover, even if CourtMoreover, even if Court ignores the Amended Complaint allegations regarding the existence hardhard numbers at the timehard numbers at the time of the Official Statement, hard numbers at the time of the Official Statement, the C werewere invalid because while the total amount ofwere invalid because while the total amount of financial aid was comparable to what the spring enrollment figures were lower than predicted by the budget, decreasing studentthe spring enrollment figures were lower than factsfacts meant the percefacts meant the percentage of fifacts meant the percentage of financial aid to student revenue would nece decreases while the numerator remains the same, the percentage must increase.

[18] The disclaimer on page A-13 states:

> IfIf these goals are in facIf these goals are in fact metIf these goals are in fact met and if the College can otherwise budget, budget, it expects to achieve a small budget, it expects to achieve a small operating budget surplus for the 1998- Conversely,Conversely, failure tConversely, failure to achConversely, failure to achieve this enrollment goal a adversely affect the College s ability to reach Financial Equilibrium.

TheThe referenceThe reference to goals in the first sentence quoted above doesThe reference to goals in the first sentence quoted abo describeddescribed two paragraphs earlier in the Official Disclaimer. Not only does the physicaldescribed two paragraphs earlier in the O thethe nomenclature as well, the nomenclature as well, supports this reading. In this section of the Official Statement only the nomencla attainattain a balanced budget and to enroll more students are described as goattain a balanced budget and to enroll more student

itit certainly does not disclose that the budget predictions advanced may be worthless becauseit certainly does

CollegeCollege had made financial aid commitments and awards prior to theCollege had made financial aid comm

notnot bothered to calculate whether theirnot bothered to calculate whether their projections were consistent with

granted.

ThTheThe AThe Amended Complaint also establishes material falsity for the estimate of financial aid

awardsawards for the upcoming year. While the Official Statement states that tawards for the upcoming yea

financialfinancial aid for 1998-99 is a further reduction to 28.8% of student income,financial aid for 1998-99 is a

amongamong the Bradford officers and Trustees atamong the Bradford officers and Trustees at the time of theamon

currentcurrent levelcurrent level to 31.3%. AC, ¶ 57. current level to 31.3%. AC, ¶ 57. This translates to a reduc

amountamount since the superceded budget discussed inamount since the superceded budget discussed in the Of

operatingoperating operating budget surpoperating budget surplus. See Crowell v. Ionics, Inc., 343 F. Su

determineddetermined by effecdetermined by effect on indetermined by effect on income, not revenue; argumen

onlyonly a small amount of revenueonly a small amount of revenue involved is specious). Moreover, theonly a

toto determining whether Bradford was in controlto determining whether Bradford was in control of its financial

steps to reduce such awards.

DefendantsDefendants assert the Court should ignore the contemporaneousDefendants assert the Court sho

itsits fiits final version was completed after the offering, sometime in May 1998. Merely because the

budgetbudget was finalized after the Official Statement does notbudget was finalized after the Official Statement do

CourtsCourts can infer that informatioCourts can infer that information formallCourts can infer that informatio

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disclaimerdisclaimer specifically refers to this enrollment goal , indicating that the prdisclaimer specifically refers to this enrollment goal to enrollmen t goals. At a m inium the dis claimer is am biguous.

YetYet even if it could be inYet even if it could be inteYet even if it could be interp reted to wa rn of the unc ertainty of me referringreferring to estimates for the next academic year, 1998-99; it doesreferring to estim ates for the ne xt academ ic year, 199 8-99; it do year migh t be materially d ifferent.

statementstatement was known before the date of tstatement was known before the date of thstatement wa responsibleresponsible for the misrepresentation would likely have known the information. responsible for the mi F.F. Supp.F. Supp. at 14-17. See also footnote 16, infra, and authorities cited, and authorities cited therein. The bu draftedrafted by Defendantdrafted by Defendant Kiszka, wasdrafted by Defendant Kiszka, was circulated to the ofof the Official Statement, and reviewed by the Finance Committee of the Board of Trustees a week before the May 13 closing. Drawingbefore the May 13 closing. Drawing all reasonable inferences in favor of th cancan infer that the discrepancies betweencan infer that the discrepancies between the financial aidcan infer that thethe Bradford Defendants (and could have been discoveredthe Bradford Defendants (and could have been discove Accordingly,Accordingly, Plaintiffs haveAccordingly, Plaintiffs have pled sufficient allegations to find that the fir were false at the time of the Offering.

TheThe Official Statement also recited thaThe Official Statement also recited that thThe Official State financfinancialfinancial aifinancial aid was the implementation of a new methodology which sought to replac withwith loans to studentswith loans to students and parents. Official Statement at A-13. This initiativewith loans t beenbeen in place been in place for the past two years. Official Statement at A-17. But the Amended Compl allegesalleges that there was noalleges that there was no initiative. Not only was there was no plan to modify Bra aidaid practices, no one instructed theaid practices, no one instructed the persons responsible foraid practices, no thethe officers or Trustees tookthe officers or Trustees took any steps to control the amount of aidthe officers or T

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[19] InIn fact,In fact, a May 26, 1998 memorandum fromIn fact, a May 26, 1998 memorandum from Defendant Kiszka demon toto financial aid numbersto financial aid numbers between the original version circulated in April and the final version approved into financ memorandummemorandum describes the changes that were made and thmemorandum describes the changes that were made and the variousvarious departments, which werevarious departments, which were cut by $300,000. He identifies no changesvarious departments financialfinancial aidfinancial aid numbers. Thus,financial aid numbers. Thus, earlier versions of the budget that were circulated before thethe increased fthe increased financial aidthe increased financial aid to student income ratio that conflicted with the disclosure Allegations containing this information, if necessary, can be added to an amended pleading.

[20] TheThe Amended Complaint doThe Amended Complaint does not The Amended Complaint does not set forth the e existenceexistence of the alleged changes in financial awards. It is, of course, difficult toexistence of the alleged changes in financial a PlaintiffsPlaintiffs have reached thisPlaintiffs have reached this conclusion based on their examination ofPlaintiffs have reached this con

ofof any plan to control financial aid, especially in light of the increasing aof any plan to control finan

discodiscountingdiscounting is clearly something investors would find material. It would demonstratdisc

Bradford sBradford s optimistic stBradford s optimistic statementsBradford s optimistic statements that they

IndeedIndeed tIndeed the lack of such a plan would help investors assess whether Bradford s goal of finanInd

equilibriumequilibrium was likely. Asserting that a plan was in place to reduce financialequilibrium was likely. As

existed, is plainly a materially false statement.

2. Defendants Defendants failure to disclose the financial aid data tDefendants failure to contradictedcontradicted the disclosures in thecontradicted the disclosures in the Official Sta in a negative light is strong evidence of scienter.

TheThe sameThe same eThe same evidence that supports the strong inference of scienter with re

enrollmentenrollment dataenrollment data supports such a finding with regard to the financial aid figures. Indeed

stronger.stronger. stronger. With regard to enrollment, Defendants werestronger. With regard to enrollment, De

falsely,falsely, disclosing favorable statisticsfalsely, disclosing favorable statistics while suppressing more relevan

DefendantsDefendants possessed highly relevant informDefendants possessed highly relevant information,Defenda

around,around, that directly contradicted the hard numbers presented inaround, that directly contradicted the hard

DefendantsDefendants were intentionally lyingDefendants were intentionally lying or they were practicing willfu

andand disclose the most recent data. And in the case of the actual financial aiand disclose the most recent data

thesethese figuresthese figures were not fresh, they were months old; anthese figures were not fresh, they were m

have been updated as part of the complete disclosure that was mandated for a bond issuance.

Plaintiffs Plaintiffs scienterPlaintiffs scienter allPlaintiffs scienter allegations compare favorably

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aidaid records, none of waid records, none of whichaid records, none of which discuss a new financial aid methodology or contai Additionally,Additionally, plaintiffs investigator interviewed, Jean Scott, the President of BradAdditionally, plaintiffs investigat SeptemberSeptemb er 1998. Septemb er 1998. W hen faced with a finan cial crisisSeptember 1998. When faced with a financial crisis the toto understand the problem s origins. Plaintiffs believe she would testify that sheto understan d the proble m s origins. Plaintiffs believe planplan for redu cing aid, bu t tplan for reducing aid, but that ove r plan for reducing aid, but that over generous tuition discounting, c principal reasons for the crisis. Factual allegations to this effect can be added, if necessary, to an amended pleading.

sufficientsufficient in Number Nine. To support their claim that inventory was overvalued on a financial statement,statement, the classstatement, the class plaintiffs in NumberNumber Nine relied upon articles in trade p thatthat computer hardware cthat computer hardware comthat computer hardware comparable to that marketed shareshare and being replaced by newer techshare and being replaced by newer technology. Tshare and bei company scompany s products and there was no evidence that any of the defendants read the articles. ReferenceReference to the articles was sufficient to meet the First Circuit s and the PSLRAReference to th requirements.

> TheThe Court holds that the above-referenced trade publication excerpts satisfy thethe pleading requirement withthe pleading requirement with respect to scienter. Acceptingthe asas representativas representativeas representative as representative ofas representative of as represe eithereither knowingly misrepresented the valueeither knowingly misrepresented the value ofeithe itit made the challenged statements, or recklessly disregarded sucit made the challenged stateme failingfailing to remain informed of important developments in the market for graphics cards.

5151 F. Supp. 2d at 27. If failing to remain abreast of trade publications (and a consequent51 F. Supp. 2d at 27. I makemake an accountingmake an accounting adjustment based on such trademake an accounting adjustment based toto inferto infer scienter, failing to stay abreast of important internal data that directly contradicts wto infer sci representationsrepresentations must, at a minimum, also constitute arepresentations must, at a minimum, also con CircuitCircuit has recognizedCircuit has recognized that publishing statements when DefendantsCircuit has recog statementsstatements were inaccurate or misleadingly instatements were inaccurate or misleadingly incompletestate F.3d at 83.

AA strong inference of scienter can also be inferred from the Official Statement s claims that aa programa program was in place to reduce financial aid awards when no such program existed. Plainly, the positivepositive statement that a plan ispositive statement that a plan is ipositive statement that a plan is in pl stronglystrongly infers thatstrongly infers that the authors and publishers of such statements intended to deceive th

thethe Official Statement, or that they were culpably reckless about reporting the non-existing policies andand methodologies. See e.g. In re Lernout & Haupsie SecuritiesIn re Lernout & Haupsie Securities Litigation (D.(D. Mass. 2002)(officers likely knowledge(D. Mass. 2002)(officers likely knowledge of fictitious claims(D. M was sufficient evidence of scienter).

EvenEven if no specific single allegatioEven if no specific single allegation contEven if no specific sin enoughenough inference ofenough inference of scienter, the plaintiff may combine various facts andenough infere fraudulentfraudulent intent to satisfy the scienter requirement. Cabletron, 311, 311 F. 3d at, 311 F. 3d at 39. Her factsfacts and circumstances the nature of the false statements, the ease with which truthful and accurate informationinformation could have been found, the internal documents known to Defendants thatinformation coul truetrue information, true information, Defentrue information, Defendants clear knowledge of Bradford Defendants Defendants desire to save the College headed foDefendants desire to save the College headed forI anan audacious borrowing programan audacious borrowing program to attract potential enrolleesan audacious bo stronglystrongly infer that the placementstrongly infer that the placement of false information instrongly infer tha neglignegligenegligence.negligence. Either Defendants intended to deceive or they recklessly refused to check financial records without concern of the financial danger they were creating for investors.

D. Defendants Defendants Failure To Disclose Bradford s Student Retention CriDefendants Misleading and Plaintiffs Have Sufficiently Alleged Necessary Scienter.

1. ByBy failing to makBy failing to make neceBy failing to make necessary disclosures of B retain students, the Official Statement was materially false and misleading.

TheThe Amended Complaint states that Bradford had an attrition rate of greaterThe Amended Complaint aa historical, longstandinga historical, longstanding problem with retaining students. AC, ¶ 49. a historical, longsta waswas a principal cause of Bradford s financial crisis, which was an organiwas a principal cause of Bradfor pre-eminent pre-eminent financial fact. AC, ¶ 53, 54. Defendant pre-eminent financial fact. AC, ¶ 53,

BradfordBradford wasBradford was mateBradford was material and that it had to be disclosed; they defend adequatelyadequately disclosed in the Official Statement.[21] This is simply not so. If the Plaintiffs Amended ComplaintComplaint overstated the contents of the Official StatementComplaint overstated the contents of the Off memoranda, the Amended Complaint would be summarily dismissed.

DeDefendants Defendants claim they adequately disclosed the College s attrition and student retention problemproblem on pages A-7 andproblem on pages A-7 and A-11, but, suspiciously, do not quote the language w disclosure.disclosure. disclosure. There are indeed references to student retention on those pages, but only adiscl wouldwould be able to divine the exwould be able to divine the existencewould be able to divine the existen disclosuredisclosure on p. A-7disclosure on p. A-7 occurs in the middle of the section entitled Thedisclosure on p. BradfordBradford intends to Bradford intends to do with tBradford intends to do with the bond proceeds, as opp or operational condition.

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[21] WithWith regard toWith regard to Plaintiffs non-disclosure claims in general, Advest asserts that there is onlyWith reg disclosedisclose when a defendant has omitted a material fact necessary to make the statements ndisclose when a defendant has omitt entirelyentirely accurentirely accurate. Disclosure ientirely accurate. Disclosure is also required where there is a statute or regulation SummaSumma Four, Inc., 93 F.3d 987, 992 (1st Cir. 1996) Here, 93 F.3d 987, 992 (1st Cir. 1996) Here, the requir, 93 F.3d 987, 9 connectionconnection with a municipal bond offering are set forth connection with a municipal bond offering are set forth in Rulec disclosuredisclosure of disclosure of financial informationdisclosure of financial information or operating data. . .material to an eval ruling on this rule, Release 33-7049, a copy of which is attached as Exhibit A, the SEC interprets this rule to require

> aa description of known facts that would significantly affect the financial information presentedpresented or future financial operations of the issuer, aspresented or future financial operations of the issuer, a operations.operations. operations. For operations. For example, in a hospital financing, a steadily declining pop surroundingsurrounding community that, in the future, wosurrounding community that, in the future, would not sup buibuiltbuilt would be important to investors. Disclosure of currently known conditions and their future impact is critical to informed decision making.

ReleaseRelease 33-Release 33-7049,Release 33-7049, Release 33-7049, § Release 33-7049, § Release 33-7049, § IIIC3cRelease 33-7049, § steadilysteadily declining population in the example provided by the SEC. Both trends call in doubt the ability of the institution to pay and are facts investors would not likely know absent disclosure. Such matters have to be disclosed.

Additionally,Additionally, as described below, there are misleading diAdditionally, as described below, there are misleading disclo informationinformation regarding the attritioninformation regarding the attrition problem to be disclosed forinformation regarding the attri ofof the Official Statement entitled Bondholders Risks,of the Official Statement entitled Bondholders Risks, the issuer warns of the futu difficultydifficulty attracting students. When an issuer warns about a current problem as only being a futurdifficulty attracting stude disclosuredisclosure is disclosure is misleading unlessdisclosure is misleading unless the truth about the current problem is fully disclose 24-25.24-25. Also, the disclosure of fall enrollment statistics24-25. Also, the disclosure of fall enrollment statistics was misleading unl disclosed. See AC, ¶ 54, and footnote 23, infra.

> TheThe primary purpose ofThe primary purpose of the Project is to expand residential capacity,T willwill enable Bradforwill enable Bradford Cwill enable Bradford College to accommodate additiaddition,addition, theaddition, the Project will enhance the residential component of Bra College,College, with College, with aCollege, with anticipated corresponding improvements to positionposition of the Collegeposition of the College and position of the College and its ability ProjectProject is necessary due to the deteriorated condition of theProject is necessary due to the de West residence halls and the Cluster Houses.

SuchSuch language hardly constitutes the disclosureSuch language hardly constitutes the disclosure of a student thethe reader wouldthe reader would hardly knowthe reader would hardly know that most Bradford College enro factfact that the administration considers the Project useful in retaining students is not the equivalent of conceding an attrition problem.

TheThe reference on p. A-17 is even more innocuous. In the section entitled Strategic Initiatives, Initiatives, the Official Statement Initiatives, the Official Statement descInitiatives, the Offic Planning and Transition.

> TheThe CoordinatorThe Coordinator works with facultyThe Coordinator works with faculty and toto the Cabinet andto the Cabinet and the Trustees, to review, revise and establish programsto the C services to attract and retain students.

ParaphrasiParaphrasingParaphrasing the job description of an employee who is concerned with student attrac retentionretention is not the equivalent of informingpotentialretention is not the equivalent of informing potential i atat Bradford has been impossible because the College cannot accuratelyat Bradford has been impossible because t studentsstudents will be present in subsequent semestersstudents will be present in subsequent semesters. Alls existingexisting cexisting cusexisting customers. Making brief references to these activities does not constitute severe retention or attrition problem.

DefendantsDefendants Defendants alsoDefendants also Defendants also contendDefendants also contend D atat A-8, at A-8, theat A-8, the spring 1998 enrollment figures, which record a reduced enrollment from the fall numb ButBut the spring figures are not disclosed in the same manner as the fall figures, and it is difficult to

determinedetermine whether thedetermine whether the difference between the total number ofdetermine whether t

studentsstudents (only a 2.7% decrease) or 36 students (a morestudents (only a 2.7% decrease) or 36 students (a

therethere is no descriptthere is no description, there is no description, much less analysis, of the difference in

investorsinvestors would not know whether such discrepancies are expected and normal (in investors would n

semestsemestersemester attrition rate was lower than the historical 7% mid year attrition rate, AC ¶ semester

otherwiseotherwise accounted for, such as due to a group of juniors taking spotherwise accounted for, such as

affiliatedaffiliated institution. Even iaffiliated institution. Even if aaffiliated institution. Even if a reader was a

statistics,statistics, the publishing of a single spring s student numbers, without explanationstatistics, the publishi

notnot identify a material problem concerning anot identify a material problem concerning attrition. not identi

most favorable to the Plaintiffs, the Official Statement is misleading.[23]

Finally,Finally, DFinally, DefendantsFinally, DefendantsFinally, Defendants relyFinally, Defendants rely

StatementStatement drafted by MIFA. In the subsection dedicated to Dependence on TuitStatement drafted b

MIFAMIFA describesMIFA describes Bradford s goal ofMIFA describes Bradford s goal of increasing enrollme

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[22] TheThe Official Statement recites (s)pring 1998 full- and part-time enrollment wasThe Offic ial Statemen t recites (s)
thethe same pages lists 550 full-time students and 32the same pages lists 550 full-time students and 32 part-time students for Fall 1997, an
listslists a headcount of 602. The difference is due to a category in the table idelists a headcount of 602. The difference is due to
OfficialOfficial Statement states whether the spring total is merely the sum of the full andOfficial Statement states whether the spring tota
discrepancydiscrepancy is only 16 enrdiscrepancy is only 16 enrollees) or idiscrepan cy is only 16 enrollees) or if it inc ludes the E LI s
compare figures in the O fficial Stateme nt that were not directly laid o ut for comp arison purp oses.

[23] Indeed,Indeed, the Amended Complaint allegesIndeed, the Amended Complaint alleges that the failure to track the spring
severalseveral years,several years, in a manner comparable to howseveral years, in a manner comparable to how the fall semester s enrolln
¶¶ 54. Had several yea rs of fall and sp ring enrollm ents been d isclosed, po tential investors would¶ 54. Had several yea rs of fall and spri
thethe routine loss of 7% of the student body between the fall and the spring, and seen that retention was a serious problem
thatthat haunted Bradford year after year. Investors would have also knownthat haunted Bradford year after yea r. Investors w ould have a
discloseddisclosed enrollment targets. Investors would realize that the College not only had to find newdisclosed enrollment targets. Inv
thethe higher entering class targets, it would have to find substantial additional students to replace thethe higher e ntering class targets, it
abando ned the sch ool after a sem ester.

Further,Further, investorsFurther, investors would certainly think twice before loaning the institution an unprecedented amount of
ifif there would be far fewer alumni than would have beenif there would be far fewer alumni than would have been anticipated byif there w
isis particularly is particularly important with regard to an institutionis particularly important with regard to an institution that repeatedly
budget. budget. If there would b e fewer alu mni in budget. If there would be fewer alumni in the following years due to heavy attrition, there
gifts could be counted u pon to pay the bond d ebt.

2000,2000, and notes (a) failure by the Institution to attract and retain students2000, and notes (a) failure by the accomplishaccomplish such goal could adversely affect the abiaccomplish such goal could adversely affe paymepayments. payments. Officpayments. Official Statement at 8. This boilerplate truism concerning fu constituteconstitute adequate disclosure of an existing, presentconstitute adequate disclosure of an existing, pres and scienter.

DisclosingDisclosing a known, exiDisclosing a known, existing problem as mereDisclosing a known, AppleApple ComputerApple Computer Securities Litigation, 886 F.2d, 886 F.2d 1109, 1115 (9th Cir. 1989)(dis ofof future problems with new product when serious problemsof future problems with new product when serious disclosuredisclosure was actionable);disclosure was actionable); NumberNumber Nine, 51 F. Supp. 2d at 24-25, v.v. Herman & MacLean, 640 F. 2d 534, 544 (8th Cir.,, 640 F. 2d 534, 544 (8th Cir., 1981)(To warn that the unto whenwhen the event is contingent is prudent,when the event is contingent is prudent, to caution thatwhen the event toto happen whento happen when they have already occurred is deceit.). Here, a very real and threatening attriti crisiscrisis affected the abilitycrisis affected the ability of the institution to survive andcrisis affected the ability of werewere no more likely than revenue fluctuation due to governmental regulation and developmewere no more affectingaffecting thaffecting the federaaffecting the federal or state tax-exempt status of non-profit organizatio 11. Investors11. Investors had a right to know11. Investors had a right to know of a serious retention crisis at t they were deliberately not informed.

2. FaFailureFailure to dFailure to disclose a known and urgent crisis raises a strong infere scienter.

TheThe attritioThe attrition crisis at Bradford is the 800 pound gorilla in the living room. It waThe dominatingdominating and pre-eminent financiadominating and pre-eminent financial fdominating and pre-em OfficialOfficial Statement. Just as one cannot honesOfficial Statement. Just as one cannot honestly ignore C failurefailure to deal with attrition could not be an accident; at best it was willful ignfailure to deal with attriti

equivalentequivalent of culpable recklessness. equivalent of culpable recklessness. The scopeequivalent of culpal

it is evidence of scienter.

DefendantsDefendants contend that their referencesDefendants contend that their references to student re

intentintent to conceal or mislead. Yet the alleged disclosures are so tepid, so colorless,intent to conceal or m

completelycompletely consistent withcompletely consistent with an intent to mislead. They raised the possibility

without disclosing the reality actuallywithout disclosing the reality actually facing the College. Had defendants

aa complete disclosure they would havea complete disclosure they would have been more forthcoming. The fact

readingreading of what they wrote wouldreading of what they wrote would not lead a potential investorreading o

isis suffiis sufficient to ris sufficient to raise a strong inference of scienter. Cf. Livid Hold

SalomonSmithBarney,SalomonSmithBarney, Inc., ___F.3d, ___F.3d ____, 2005 WL 767100, ___F.3d ____, 200

allegesalleges alleges thatalleges that alleges that defendantsalleges that defendants alleges that defendants knewalle

made, heightened pleading standard for scienter has been met).

AdditionalAdditionally,Additionally, Additionally, of course, the other facts and circumstances descri

consideredconsidered in examining whether sufficient scienter has been alleged. For the reasons described

above, scienter also exists regarding the failure to disclose the College s attrition situation.

E. PlaintiffsPlaintiffs Have SufficientlyPlaintiffs Have Sufficiently Alleged Defendants False Disclo of a Strategic Plan

TheThe Official Statement pegs BraThe Official Statement pegs Bradford sThe Official Statement pegs Brad

describeddescribed in the Official Statement as the College s strategidescribed in the Official Statement as the

referencesreferences to these initiatives in the Official Statement. The Amended Complaint alleges, that there

waswas no plan to deal with the attrition crisis, nowas no plan to deal with the attrition crisis, no plan towas no plan

[24] AdvestAdvest claims that BrAdvest claims that Bradford never rAdvest claims that Bradford never represented that OfficialOfficial Statement explicitly refers to Bradford s strategic plan onOfficial Statement explicitly refers to Bradford s strategic pla to being able to pay the bonds.

toto stated to stated goal) of increasing enrollment. AC, ¶ 59. Indeed, according to NEASC, the accredito stated

body,body, Bradford s currentbody, Bradford s current planning for recruitment, retention, facultybody, Bradfor

manymany other parameters was inconsistent with their goal of enrolling over 700 students within two

and a half years. AC, ¶ 60. There may have been goals, but there was no plan.

DefendantsDefendants attempt to trivialize tDefendants attempt to trivialize this allegatiDefendants atte

OfficialOfficial Statement lieOfficial Statement lied wheOfficial Statement lied when it claimed that Bradford

MischaracterizingMischaracterizing Plaintiffs allegations will not make them go away.Mischaracterizing Plaintif

havinghaving a dream and having a planhaving a dream and having a plan to make the dreamhaving a dream and ha

did not exist. Falsely stating that such a plan existed is a materially false misrepresentation.[25]

TheThe Bradford Defendants point to affirmative steps that DefThe Bradford Defendants point to

enrollment,enrollment, particularly relyingenrollment, particularly relying on marketing plan the College commis

Associates,Associates, which is referenced inAssociates, which is referenced in the Official StatementAssociates

inin the pasin the past doin the past does not mean that it had a current plan at the time of the offering to

objectives setobjectives set out by its former consultant.[26] Moreover, the Official Statement acknowledges Mor

thethe Dehne plthe Dehne plan was methe Dehne plan was merely a marketing plan, not a strategic plan

continued existence. The fact that thecontinued existence. The fact that the Trustees solicited a marketing plan

[25] TheThe difference betw een a representation abo ut the existence of a The difference between a representation about the e aboutabout attempting to meet the goals of the plan must be maabout attem pting to mee t the goals of th e plan mu st be made cleabout Defend antsDefendants did not misrepresent current conditions that made attainment of the plan s goals unlikely, Defendants cannot bebe helbe held liable merelybe held liable merely for not meeting the plan s goals. Indeed, securities law assumes the market disc assertionassertionsassertions about meeting distant plan goals. But even if the market does not expect the issuer to meet all of its goaas itit clearly is material that there is a concrete plan. With Bradford s track record,it clearly is material that there is a concrete plan. With wouldwould have entrusted any funds with Bradford had the college disclosedwould have entrusted any funds with Bradford had the colleg the investor th at it had no co ncrete plan to meet the g oals neces sary to perm it repaymen t of the bond s.

[26] AccordingAccording to the Official Statement, the Dehne planAccord ing to the O fficial Stateme nt, the Deh ne plan wa 1997,1997, a year before the offering. It is not1997, a year before the offering. It is not the strategic plan or strategic initiative that the Off then curren tly existing at the time of the bo nd offering.

conclusive evidence that the strategic plan claimed by the Official Statement really existed.

TheThe CourThe Court must take the allegations of the Complaint as true. If no plan existed, bThe Co CollegeCollege represented the existence of such a plan to get investors to fund unachievable objectives, thethe Official Statement contained a material falsehood.[27] Further, Further, the f Further, the false represen existenceexistence of a fictional planexistence of a fictional plan leadsexistence of a fictional plan leads to a strong plan in a document designed to raise money intended to deceive the potential investors.

F. Defendants Defendants Disclosure That Bradford Would Contribute $1 MiDefendants Dis RenovationRenovation ProjectRenovation Project When It Had No Intention of Making Such a Co False, Misleading and Intentional

TheThe final material misrepresentation alleged by the Plaintiffs are the statements onThe final material m ofof the Officialof the Official Statement that the dormitory construction and renovation project will be paid forof thethe bond proceeds and an equity contribution of $1 million from Bradford. the bond proceeds and an equity contr AlthoughAlthough Bradford s commitment is not conditioned in the Official Statement,[28] minutes o minutes o BoardBoard of TBoard of Trustees demoBoard of Trustees demonstrate that the Trustees had no intention to m behalfbehalf of the College. The Financebehalf of the College. The Finance and Building and Groundsbehalf of ofof Trustees, composed of 11 of the individual defendants, recognizedof Trustees, composed of 11 of the individ bebe insufficient to pay the full costs of the renovation, but refused to be insufficient to pay the full costs of th

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[27] FurtherFurther evidence of the lack of a plan, notFurther evidence of the lack of a plan, not currently included in the con byby an amendment, is the fact that the budget cuts being considered byby an amendment, is the fact that the budget cuts being considered DefendantsDefendants at the time of the Offering directly contradictedDefendants at the time of the Offering directly contradicted theDe The cuts being consideredThe cuts being considered (and ultimately adopted) included cuts to the admissions andThe cuts being consid thethe officers and trustees knew would hinder the ability to meet their enrollment targets, fthe officers and trustees knew would hinde Statement stated would be hired,Statement stated would be hired, and student services which the Official Statement claimed the Colleg improve.improve. Indeed, while the Official Statement discloses planned growth and expansion, theimprove. Indeed, while the Official S that would make it impossible to recruit the students or carry out the programs necessary to pay the bond debt.

[28] OnOn page 10, the OfficialOn page 10, the Official Statement states thatOn page 10, the Official Statement states tha toto build and renovate campus buildings. A table on theto build and renovate campus buildings. A table on the same page informs million. AC, ¶ 46.

makemake up the difference. Instead, the comake up the difference. Instead, the committeemake up the di added)added) be made to reduce construction costs soadded) be made to reduce construction costs so added) be IfIf a contribution had to be made, BradfordIf a contribution had to be made, Bradford would only do so at the end TheThe Official Statement did not disclose the conditThe Official Statement did not disclose the conditional ar contribution.

Defendants Defendants primary defense toDefendants primary defense to this claim isDefendants primar thethe meeting minutes do not support the allegthe meeting minutes do not support the allegatiothe me contribution.contribution. But the minutes are clear. *Every effort* is to be used so that Bradford is to be used so toto maketo make the contribution. Only if it absolutely must,to make the contribution. Only if it absolutely must thethe end of the project. The primary thrust of the committees conclusion is that ifthe end of the project. The prin projectproject will be builtproject will be built solely using the bondholders money. The meeting minutes, which verbatim in the Amended Complaint, AC, ¶ 65, support the allegation.[29]

DefendantsDefendants also claim that by May 1998 the Trustees had changed their position and decided toto make the contribution. But there are no facts in the Amended Complaint to support suchto make the con assertion.assertion. Nor do Defendants present any documentsassertion. Nor do Defendants present any docume toto Plaintiffs knowledge, the meeting minutes referenced in paragraphto Plaintiffs knowledge, the meeting minu BoardBoard priorBoard prior to the Bond issuance. Defendants desire to have the Court dismiss thisBoard prior t theirtheir uncorroborated assumption that the Board must have changed its mind fliestheir uncorroborated assum requirementrequirement that the Court must decide the motion to dismiss on therequirement that the Court must dec the reasonable inferences that can be drawn in the Plaintiffs favor.

PlaintiffsPlaintiffs do not Plaintiffs do not devote anyPlaintiffs do not devote any paragraphs of the

[29] InIn fact, Brad ford never m ade the co ntribution. Th isIn fact, Brad ford never m ade the co ntribution. Th is fact is not in t inserted in an amended pleading.

materialitymateriality materiality of tmateriality of the misrepresentation. Yet materiality is obvious. In

representationrepresentation that therepresentation that the borrower will make a sizeable equity contribution, in t

isis clearlyis clearly material. Such a contribution insures the bondholders that it isis clearly material. Such a con

isis at risk, and that the project has value to the borrower as well. Further, the amount of an equity

contributioncontribution is directly relevant to the valuecontribution is directly relevant to the value of property the

considerationconsideration if the bconsideration if the bondholders are nconsideration if the bondholders are n

borrowerborrower to obtain repayment, as, of course, occurred in this case. To the extent Plaintiffs failure

to explain materiality is a pleading defect, this defect can easily be cured by amendment.

ScienterScienter is not an obstacle to this cScienter is not an obstacle to this claim. At Scienter is no

OfficialOfficial Statement and the underwriteOfficial Statement and the underwriter would Official Statement a

thatthat Bradford had in fact authorized thethat Bradford had in fact authorized the bond issuance. Thethat Bradford

makemake an equity contribution unless there was no other choice would have been reviewed at the same

timetime and both the authorstime and both the authors and the underwriter would have known that thetime and bo

anan equity contribution. Nonetheless, they did not correct or modify the disclosures in the Official

Statement.Statement. Ignoring the black and white mandateStatement. Ignoring the black and white mandate of the

scienter.

G. PlaintiffsPlaintiffs Have Met The Minimal BurdPlaintiffs Have Met The Minimal Burden Pl Adequately

Although a Rule 10b-5 complaint mustAlthough a Rule 10b-5 complaint must allegeAlthough a Rule 10b

isis not subject tois not subject to the heightened pleading standards for allegations of misrepresentationis not subje

CrowellCrowell v. Ionics, Inc., 243 F. Supp. 2d., 243 F. Supp. 2d 1, 22 (D. Mass.., 243 F. Supp. 2d 1, 22 (D. Mass.

v.v. Broudo, Docket No. _______, slip op. at 10 (April 19, 2005) (Dura PharmaceuticalDura Pharmace

(causation(causation pleading rules are not meant to impose(causation pleading rules are not meant to impose a g

isis the is the causis the causal connection between a material misrepresentation and the alleged loss. Pharmaceutical at 6. The common law principles of proximate causation are applied to determine whetherwhether lowhether loss causwhether loss causation has been properly alleged. Dura Pharmaceuti RestatementRestatement (Second) of Torts, treatises on Tort law and Massachusetts commonRestatement (Secon be examined to determine elements of loss causation).

AlthoughAlthough DuraDura Pharmaceuticals, the recent Supreme Court decision on securities, the recent causation,causation, does notcausation, does not provide much guidance on the necessary nexuscausation, does not lossloss and loss and thloss and the alleged misrepresentations,[30] courts have required that the subject of the fr statementstatement or omission was the cause of the actual lossstatement or omission was the cause of the actual los F.3dF.3d 161, 173 F.3d 161, 173 (2nnd Cir. 2005) citing Suez Equity Investors, L.P. v. Toronto-Dominion Bank F.3dF.3d 87, 95 (2nd Cir. 2001). Stated another way, Cir. 2001). Stated another way, the loss must be foreseeabl causedcaused by the materialization of the concealed risk. Lentell, 396 F.3, 396 F.3d at 173. Such , 396 F.3d a mademade when a jury could findmade when a jury could find that by failing to disclose materialmade when a jury c thethe very risk to which plaintiff fellthe very risk to which plaintiff fell victim. Castellano v. YoungCastellano v. Cir.Cir. 2001). Or, asCir. 2001). Or, as Judge Mazzone stated in MillerMiller v. New America High Income Fund, 1099,1099, 1108 (D. Mass. 1991) the Plaintiffs must allege that they1099, 1108 (D. Mass. 1991) the Plaintiffs m materializedmaterialized were the risks of which they were unaware as a result of defendants misleading statements.

Here,Here, Plaintiffs allegeHere, Plaintiffs allege that the very risks they contend defendants concealed th discloseddisclosed disclosed expected enrollment in the fall 1998 , AC ¶ 68; the ballooning financial aid awards

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[30] DuraDura Pharmaceuticals merely holds that a simple allegation of a pur merely holds that a simple allegation of a sufficientsufficient pleading of loss causation. Slip op. at 7-9. The Court expressly declined tosufficient pleading of loss causation. Sli or loss-related questions. Id. at 9.

tuitiontuition discounting,tuition discounting, AC, ¶ ¶tuition discounting, AC, ¶ ¶ 70, 75; the historic level of stude ofof a strategic plan, ¶ 74 led to the financial crises that caused theof a strategic plan, ¶ 74 led to the financial c andand defaultand default on the bonds. AC, ¶¶ 74-76. As a result of that default, the principal amounand def bondsbonds remains unpaid. AC, bonds remains unpaid. AC, ¶ 78. bonds remains unpaid. AC, ¶ 78. Plaintif losseslosses are caused by the materializalosses are caused by the materialization of the losses are caused concealedconcealed in theconcealed in the Official Statement.concealed in the Official Statement. Moreover, it is result in an inability to pay the bonds.

Defendants contend that the allegations in theDefendants contend that the allegations in the Amended Co pleadingpleading thpleading thatpleading that the Plaintiffs losses were caused, as a matter of law, by other adequatelyadequately warned about in the Official Statement. By ignoring the allegations of the Amended ComplaintComplaint cited in the preceding paragraph, and relying on those allegations favored by Defendants, thethe the Court would violate a cardinal rule of Rule 12(b)(6) jurisprudence, that all allegationthe Court woul ComplaintComplaint must be viewed in theComplaint must be viewed in the light most favorableComplaint must SecuritiesSecurities LiSecurities LitSecurities Litigation, 224 F. Supp. 2d 319, 338 (D. Mass. 2002)(although ot complaintcomplaint were possible, loss causation adequately alleged when all inferences drawn in plaintiffs favor).

NorNor can defendants rely upon allegationsNor can defendants rely upon allegations relevant to theNor c countcount to attempt to dismiss the 1934 Act claims. Rule 8(e)(2) permits the Pcount to attempt to dismi alternativealternative theories of liability and suchalternative theories of liability and such claims do not have to b a causation allegationa causation allegation related to one theory of liability cannot be used as ana causation alle anan aan alternatian alternative count. Rodriguez-Suris v. Montesinos, 123 F.3d 10, 20-21 (1st Cir. 1997). Th merelymerely because plaintiffs alleged in their breach of fiduciary dutymerely because plaintiffs alleged in their

thethe failure of the Bradthe failure of the Bradford the failure of the Bradford Defendants to close the Colleg

enrollmentenrollment in fall 1998, AC, ¶ 72, or that the enrollment in fall 1998, AC, ¶ 72, or that the faenrolln

assuredassured that the College could never recruitassured that the College could never recruit sufficient students t

¶¶ 71, does not mean that these¶ 71, does not mean that these events were¶ 71, does not mean that thes

misrepresentationsmisrepresentations in the Official Smisrepresentations in the Official Statemenmisrepresen

Moreover,Moreover, a defense that the plaintiffs losses were caused by some intervening event other that the

allegedalleged misrepresentationsalleged misrepresentations indisputalleged misrepresentations indisputably

12(b)(6)12(b)(6) motion to12(b)(6) motion to dismiss. Emergent CapitalEmergent Capital Investment Managem

Inc.,, 343, 343 F. 3d 189, 197 (2nd Cir. 2003); Swack v. Credit Suisse First Boston, 2004 WL, 2004 WL 2203482 *1

(D. Mass 2004)(Woodcock, J.).

Defendants Defendants argument that Plaintiffs loDefendants argument that Plaintiffs losses were Def

knowledgeableknowledgeable is alknowledgeable is also unaknowledgeable is also unavailing. Once again De

werewere the basis of their bespeakswere the basis of their bespeaks caution defense.were the basis of their b

[31] EvenEven if theEven if the inconsistent allegations relatedEven if the inconsistent allegations related to the breach of
inin in evaluating whether causation had been adequately alleged, the Court would have to deny the Defendan in evaluating whether c
First,First, the Amended Complaint does not allege that these two events were the *sole* cause of Plaintiffs damage. While
thesethese eventsthese events maythese events may have harmed the plaintiffs, these allegations do not require a finding that the misrepre
notnot a material factor in causing Plaintiffs damages. Thenot a material factor in causing Plaintiffs damages. The damage causednot
isis completely consistent with Plaintiffs claim that the misrepresentations caused their investmentis completely consistent with Plaintiffs
budgetbudget crisis was directlybudget crisis was directly caused by the lower thanbudget crisis was directly caused by the lower than pre
andand the historic attrition problems, all of which Defendantsand the historic attrition problems, all of which Defendants knowiand
Statement.Statement. These undisclosed eventsStatement. These undisclosed events caused the College to make additional cuts that destro
theirtheir financial goals,their financial goals, a completely foreseeable event given the looming financial bad news Defendants failed toth
in May 1998.

TheThe allegations here must be contrasted with the facts inThe allegations here must be contrasted with the facts in MilleM
Supp.Supp. 1099, 1108Supp. 1099, 1108 (D. Mass.Supp. 1099, 1108 (D. Mass. 1991), the case relied upon by the Defendants. There, t
thatthat their losses were not caused by the subjectthat their losses were not caused by the subject of the misrepresentations. The alleged
defendants,defendants, managers of adefendants, managers of a junk bonddefendants, managers of a junk bond fund, would only invest in
managementmanagement tactics. Had plaintiffs almanagement tactics. Had plaintiffs allemanagement tactics. Had plaintiffs allege
bondsbonds promised, Judge Mazzone found the complaint would habonds promised, Judge Mazzone found the complaint would h
admittedadmitted the losses were caused solely by the cadmitted the losses were caused solely by the collapse of admitted the losses
analogousanalogous concession for example, that Branalogous concession for example, that Bradfordanalogous concession for example,
to fail would the Court be justified in dismissing on loss causation grounds at this stage.

achieachieveachieve its desired objectives fails to sufficiently warn investors that there are present fachiev known(orknown(or recklknown(or recklessly iknown(or recklessly ignored) by Defendants that strongly indicat werewere not going to be met. See Rodi Rodi v. Southern New England School of Law, 389 F. 3d 5, 15 (1st Cir.Cir. 2004), discussed in detail at 80,Cir. 2004), discussed in detail at 80, infra. I If Defendants argu ddisclaimerdisclaimer that an investment involves risk and the investor might lose his invesdisclaimer that a immunizeimmunize all transactions from liabilityimmunize all transactions from liability on loss causation grounds thethe fraud, the investor was warned about the very contingency which occurred, the lthe fraud, the investo investment.

H. PlaintiffsPlaintiffs Can Sufficiently Tie All of the Defendants To Violations of thePlaintiffs Can S

AllAll Defendants allege that even All Defendants allege that even if PlaintAll Defendants allege that e againstagainst Bradford, who is notagainst Bradford, who is not a party in against Bradford, who is not a demonstratedemonstrate that the persons the Plaintiffs have sued have violated the securities laws. Tdemonstrat threethree categories of Defendants againstthree categories of Defendants against whom the Plaintiffs have alleged underwriter,underwriter, Advest;underwriter, Advest; the Officer Defendants, and the Trusteeunderwriter, Advest; claims against each of them in turn.

1. AdvestAdvest was reckless in failing to confirm easily accessible infoAdvest was rec relevant to the bond offering

AdvAdvestAdvest concedes, as it must, that as the underwriter for the bond offering it had a dAdvest co performperform a reasonable investigation.perform a reasonable investigation. Glassman v. Computervision Cor 1996).1996). This is particularly true for1996). This is particularly true for 1996). This is particularly true exemptexempt from the registration requirements, but the SEC has exempt from the registration require underwritersunderwriters to provide accurate disclosures underwriters to provide accurate disclosures to prospe 1717 CFR §240.15c2-12. Where an underwriter s conduct constitutes a sufficiently extreme departure

fromfrom the standards of the profession, scienter is established. SEC v. DainSEC v. Dain Rauscher, Inc., 254 F.3

852, 859 (9th Cir. 2001).

TheThe First Circuit has identified at least two componentsThe First Circuit has identified at least two com

investigation.investigation. First, the underwriter must continue to investigate the issuing entityinvestigation. Fir

ofof the offering. Glassman, 90 F.3, 90 F.3d at , 90 F.3d at 628. Second, the underwriter cannot rely solely

representationsrepresentations ofrepresentations of managemenrepresentations of management where it is possib

of the Complaint make it plain that Advest failed both of these duties.

Here,Here, plaintiffs have alleged that materiaHere, plaintiffs have alleged that material out of dHere

OfficialOfficial Statement, particularly the obsolete financial aid data and the predictions from outdated

budgets.budgets. AC, budgets. AC, ¶¶budgets. AC, ¶¶ 56, 57, 62, 63. It can reasonably be inferred that A

determinedetermine whether updated indetermine whether updated infdetermine whether updated information w

AdvestAdvest plainly knewAdvest plainly knew Advest plainly knew that the College possessed actual data

financialfinancial aidfinancial aid spending for the almostfinancial aid spending for the almost completed school y

whichwhich would have contained the latest financiawhich would have contained the latest financialwhich would ha

among Bradford Officers and Trustees at the time the bond offering was in its final stages.[32]

ItIt is also clear from the Complaint s allegations that AdvIt is also clear from the Complaint s al

projectionsprojections contained in the Official Statement. The true status of the College s enrollment

prospectsprospects for the next yprospects for the next year weprospects for the next year were set forth in Adm

TheThe most recent reportThe most recent report would have verified the selective disclosure relating toThe most r

---

[32] TheThe Official Statement, at A-17, states that aThe Official Statement, at A-17, states that a revised budget for the upc Trustees and the Finance Committee in May.

[33] ToTo the extent this fact is not curreTo the extent this fact is not currently iTo the extent this fact is not currently in pleading.

updatedupdated budgupdated budgets wupdated budgets were also readily available from Defendants Kiszka Trustees.Trustees. TheTrustees. The February 1998 Trustees minutes, which Advest would have reviewed to in thethe bond offering had been authorized, would have let Advest know that thethe bond offering had been authoriz toto make ato make a $1 million equity contribution, andto make a $1 million equity contribution, and a review of I revealerevealedrevealed the depth of the financial crisis, including Kiszka s accurate prediction that the Collrev couldcould only survivecould only survive for tcould only survive for two or three more years, and the extent o AA simple request to reviewA simple request to review the A simple request to review the Strategic Initia Statement,Statement, or the newStatement, or the new meStatement, or the new methodology that allegedly determined that these programs and plans did not exist. It is impossibledetermined that these programs and plan whowho waswho was actuallywho was actually attempting to verify the statements in the Official Statement would these discoveries.

TheThe ease with which the truth could have been determined bThe ease with which the truth could ha sufficientsufficient to infer sufficient recklessness onsufficient to infer sufficient recklessness on the part of an unde toto question and investigate. However, thereto question and investigate. However, there are additionalto questio CourtCourt does not believe these are sufficient facts are alleged in the Amended Complaint. Court does not includeinclude thatinclude that Advest only visited the College twice, that it neverinclude that Advest only visite projectionsprojections provided by Bradford, that it never requested contingency plansprojections provided by Brad thatthat it acceptedthat it accepted projectithat it accepted projections with facially unreasonable assumptions an obsoleteobsolete budget data provided byobsolete budget data provided by Bradfordobsolete budget data provid updateupdate the information. Ifupdate the information. If the current allegations are insufficient, Plaintiffsupda to further describe Advest s reckless conduct.

AdvestAdvest also contendsAdvest also contends that it cAdvest also contends that it cannot be held

because it was not the author of the false and misleading statements in the Official Statement, but onlyonly had review and approval responsibilities. Relying on Central Bank of DenCentral Bank of DenverCe InterstateInterstate Bank of Denver, N.A., 511 U.S. 511 U.S. 164 (1994) it 511 U.S. 164 (1994) it contends o mademade the alleged misrepresentations can be found liable under Section 10(b). Homade the alleged misre Bank does not always shield underwriters from primary does not always shield underwriters from primary liability. 2d2d 330, 341 (D.2d 330, 341 (D. Mass. 2005).2d 330, 341 (D. Mass. 2005). Primary liability may be impose fraudulentfraudulent misrepresentations but also onfraudulent misrepresentations but also on those who had kno perpetration. perpetration. SEC v. First Jersey Securities, Inc, 101 F.3d 1450, 1471 (2nd Cir. 1996) quoting Azreilli v. Cohen Law Offices, 21 F.3d 512, 517 (2nd Cir. 1994).

InIn evaluating Advest sIn evaluating Advest s roleIn evaluating Advest s role in the fraud at issue, the C thethe underwriter plays in municipal bond offerings. As willthe underwriter plays in municipal bond offerings. II.A.1II.A.1 infra, the issuers and beneficiaries of municipal bond offering, the issuers and beneficiaries of mun registration,registration, particularly when the offering is made for the bregistration, particularly when the offe non-profitnon-profit entity. 15 U.S.C. §§ 77c(a)(2) and (4). To insure that investors do receive accurate disclosudisclosuresdisclosures regarding the relevant entities in a municipal bond offering, the SEC has passedi 15c2-12,15c2-12, 15 CFR15c2-12, 15 CFR §240.15c2-12, which places primary responsibility for the distribution andand operating information material to the evaluation of the offeringand operating information material to the Rule,Rule, a securities dealer cannot underwrite or even recommend a municipal security unless it has reviewedreviewed the offering s official statement, taken responsibility for distributingreviewed the offering s o purchaserspurchasers and potentialpurchasers and potential purchasers of the bonds, and insuredpurchasers and thethe the bond othe bond offering will be available through municipal security information repositories. 15 C §240.15c2-12b§240.15c2-12b and c. The SEC also requires the§240.15c2-12b and c. The SEC also requires the u

ofof the key representations made by an issuer in thof the key representations made by an issuer in the Offic Responsibilities,Responsibilities, Securities Exchange Act Release No. 26100, § III, 53 C.F.R. 37778 (Sept. 28 1988)

InIn its official InterpretaIn its official Interpretation of aIn its official Interpretation of an underv municipalmunicipal securitymunicipal security offering, which the SEC promulgated at the same time it proposed R thethe SEC hasthe SEC has emphasized the vital position the underwriter plays in such offering. the SEC has emp regardregard to negotiated municipal offerings, such as the one involved in this case, theregard to negotiated mun thatthat the underwriter will be involved in the preparation of thethat the underwriter will be involved in the pre thethe underwriterthe underwriter must review a near complete draft of the official statement beforethe underwrit offering,offering, the offering, the SEC expoffering, the SEC expects it will often influence the content of committingcommitting to an offering. Municipal Underwriter Responsibcommitting to an offering. Munic ReleaseRelease No. 26100, § III, 53 CFR 37778, 37789-90 (Sept. 28, 1988Release No. 26100, § III, 53 CF expectationsexpectations have beexpectations have been proven expectations have been proven correct, the un documents,documents, including the disclosures. See e.g. SEC v. Dain Rauscher, Inc., 254 F.3d 852, 854 (9th Cir. 2001).

WhileWhile it iWhile it is possibleWhile it is possible for the plaintiffs to conduct pre-discovery investig whetherwhether misreprewhether misrepresenwhether misrepresentations have been made in an offering docum actualactuallyactually actually draftedactually drafted actually drafted whatactually drafted whatactually drafted wh onlyonly to Advest and the individual defendants who sionly to Advest and the individual defendants who sig determinesdetermines that theredetermines that there are not sufficient allegations to determine whether thedeterm held liable as a primaryheld liable as a primary violator, it should allow the Plaintiffsheld liable as a primary vio

before it dismisses these claims against Advest with prejudice[34].

[34] SuchSuch disc overy w ill not defeat tSuch discovery will not defeat the purSuch discovery will not defeat the pur
4(b)(3)(B)4(b)(3)(B) because P laintiffs4(b)(3)(B) because Plaintiffs have demonstrated that they have a meritorious securities fraud4(b)(
requestedrequested discovery is not torequested discovery is no t to determine if thererequested discovery is not to determine if there is a v
AdvestAdves t willAdvest will still remain in the actionAdvest will still remain in the action under Plaintiffs Section 12 claims, Uniform S
representationrepresentation and 93A claims,representatio n and 93A claims, see S ection II and III, infra, granting Plaintiffs discovery o
aa party who would otherwise be exempt from discovery demands of this action. Plaintiffs will be entitled to the same
discoverydiscovery to defediscovery to defend a gainst A discovery to defend against Advest s due diligence and reasonable efforts
claims.

2. PlaintiffsPlaintiffs Have Stated Causes ofPlaintiffs Have Stated Causes of ActioPlaintiff
Officer Defendants

TheThe Bradford Defendants do not contest the Plaintiffs ability to tie the Officer Defendants, ShortShort andShort and KiszShort and Kiszka, to the misrepresentations and omissions in the Official Stateme Short,Short, after all, signed the appendix to theShort, after all, signed the appendix to the Official Statement cor TheThe BradfordThe Bradford Defendants, however, do contest whether Plaintiffs have sufficiently allegedThe B with regard to these individuals.

AsAs the As the two senior ofAs the two senior officers of the College, Short and Kiszka, had acc recreceivedreceived threceived the reports and data which contradicted the Official Statement s projections re enrollmentenrollment and fienrollment and financial aid.enrollment and financial aid. AC, ¶ 34.[35] Kiszka, a initiatedinitiated and circulated the budgetsinitiated and circulated the budgets that contradicted the financialinitiat werewere circulated to the President. AC, ¶were circulated to the President. AC, ¶ 57. Kiszka also hadwere circu datadata that belied the Official Statement s predictions regarding the currentdata that belied the Official S predictions.predictions. Similarly, the admissions data thatpredictions. Similarly, the admissions data that contradi routinelyroutinely generated by the school s admissions officroutinely generated by the school s admissions of to the President and the CFO.

TheThe PresidentThe President and CFOThe President and CFO would also know whether or not a studen Bradford.Bradford. Indeed,Bradford. Indeed, the dire situation was disclosed inBradford. Indeed, the dire situati himself was the onehimself was the one who predicted only two to three more years for thehimself was the one v wouldwould have both known of the non-existence of the financial aid reductionwould have both known of the strastrategicstrategic plan. With regard to the Board decision to use all efforts to avoid makingstrategic plar

[35] ToTo thTo the extent such allegations pled with sufficient specificity in the current complaint, tTo the extent such a detailed by an amended pleading.

contrcontribution,contribution, Short attended the meeting where this policy was decided. AC, ¶ 65. Althoughc allegedalleged in the Amended Complaint, the minutes of the Board Comalleged in the Amended Complair BradfordBradford Defendants have attached as ExhibitBradford Defendants have attached as Exhibit 2 to their supp was also present and made the financial presentation to the Committee members.[36]

InIn short, the Plaintiffs haveIn short, the Plaintiffs have alleged, or can easily amend to allege, that Short ar knowledgeknowledge ofknowledge of all of the material factsknowledge of all of the material facts that were either theythey signed the Bradford appendix contained withithey signed the Bradford appendix contained within the failedfailed to check the records and information they possefailed to check the records and information th misrepresentedmisrepresented tmisrepresented them. misrepresented them. Combined with the other circum describeddescribed above, these facts are sufficientdescribed above, these facts are sufficient to raise a strong infer two defendants.

3. TheThe Trustee Defendants May Be FounThe Trustee Defendants May Be Found T Bradford

TheThe Bradford DefendantsThe Bradford Defendants correctly state that the Plaintiffs have not pled spe connectconnect any of the Trustee Defendants to tconnect any of the Trustee Defendants to the misrepresc Statement[37].. Although. Although many of the Trustees had knowledge regarding the contested. Although many o TrusteesTrustees did not sign the Official Statement, and without discoveryTrustees did not sign the Official Statem allege the roles the individual Trustee Defendants had in drafting, preparing and approving it.

The Trustee Defendants, however, are stillThe Trustee Defendants, however, are still liable to the Plainti

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[36] Kiszka,Kiszka, in fact, appears to have drafted the minutes of the Committee meetings, sinceKiszka, in fact, appears to at the bottom of the document.

[37] Plaintiffs doPlaintiffs do not consider Defendant Short to be a TrusteePlaintiffs do not consider Defendant Short to be satsat sat on the board of trustees, he was also the President. He signed the disclosure and most certainly can sat on the board o responsible for its contents.

§§ 20(a). To establish a §20(a) claim, a plaintiff§ 20(a). To establish a §20(a) claim, a plaintiff must§ 2 controlledcontrolled person or entity; and (2) that a defendant controlled the violator.controlled person or entity; 85; GarveyGarvey v Arkoosh, 354 F., 354 F. Supp. 2d 73, 85 (2005). The Complaint clearly depicts Rule 10b-5 violationsviolations by Bradford, the entity the Trustee Defviolations by Bradford, the entity the Trustee De BradfordBradford has filed for bankruptcy and is not a party to action is immaterial. SeBradford has file WorldComWorldCom Inc. Securities Litigation, 294 F. Supp. 2d 392, 419-20 (S, 294 F. Supp. 2d 392, 419-20 (S.D.N §§ 20(a) claim§ 20(a) claim against Director§ 20(a) claim against Director Defendants based on their control of Wo that WorldCom was not a defendant in action.) .

TheThe Bradford Defendants also allege tThe Bradford Defendants also allege that the PThe Bradford controlcontrol over Bradford. The Bradford Defendants forget, however, tcontrol over Bradford. The Bradfor pleadingpleading standards do no apply to § 20 claims. In reIn re WorldCom Inc. SecuritiesIn re WorldCom Inc Supp. 2d at 415-16. Liability under § 20 is notSupp. 2d at 415-16. Liability under § 20 is not premised on the d statementstatement or material omission, orstatement or material omission, or having acted with a particular state ooror 15 U.Sor 15 U.S.C. § 78u-4(b) apply. Moreover, the First Circuit has recognized that (c)ontrol is a questionquestion of factquestion of fact that will not ordinarily be resolvedquestion of fact that will not ordinarily be F.3dF.3d 11, 41 (1st Cir. 2003). Accordingly, Plaintiffs control claims again Cir. 2003). Accordingly, Plaintiffs survivesurvive if the Amended Complaint alleges that theysurvive if the Amended Complaint alleges that they ex with Rule 8(a). The Amended Complaint meets this showing.

TheThe Amended Complaint states (as does the OfficialThe Amended Complaint states (as does the Officia byby the Trusteeby the Trustee Defendants. AC, ¶ 40.by the Trustee Defendants. AC, ¶ 40. It also alleges that the thethe management and activities ofthe management and activities of the College, AC, ¶ 37,the management and ac

diddid indeed direct the management of Bradford.[38] It further state It further states It further states that

drafting,drafting, prepdrafting, preparation drafting, preparation and/or approval of the Official Statement and

disregardeddisregarded the misrepresentations and material omissions contaidisregarded the misrepresentations

allegatioallegationsallegations constitutallegations constitute a short, plain statement that the Board had the a

exerciseexercise control over the College, including the activities thatexercise control over the College, including

this stage of the proceeding, that is all that is required.[39]

II. PLAINTIFFSPLAINTIFFS HAVE STATED A CLAIM AGAINST ADVEST UNDER SECTION 12 OF THE SECURITIES ACT OF 1933.

A. PlainPlaintiffPlaintiffs Plaintiffs Interest In Bradford s Contract To Repay The Bond Debt Is A Security That Is Not Exempt From The Antifraud Provisions of the 1933 Act.

1. TheThe agreement of a beneficiaryThe agreement of a beneficiary of conduit financingThe aa municipal bond offeringa municipal bond offering is a separate security which may be su antifraud provisions of the 1933 Act.

CountCount Count IIICount III, which Plaintiffs have brought against Advest alone, alleges that Advest sold toto them tto them through the use of a prospectus that contained untrue statements of material fact ato the materialmaterial material omissions in violation of § 12(a)(2) of the 1933 Act, 15 U.S.C. §77l(a)(2). Adves principrincipalprincipal defeprincipal defense is that the bond offering was exempt from Section 12. Exempt securitiessecurities lsecurities laws are nasecurities laws are narrowly construed and Advest bears the burden Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); S.E.C. v. Ralston Purina Co., 346 U.S., 346 U.S. 119, 126 (1953)

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[38] See See e.g. ¶¶ 47, See e.g. ¶¶ 47, 51 (attempting to engage in financial planning), ¶ 50 (approving dormitory construc project),project),¶¶ 57, 69 (reviewingproject),¶¶ 57, 69 (reviewing and approving Bradford s budget), ¶ 65 (deciding to not make aprojec renovationrenovation project), ¶ 72 (deciding to continue with renovation project), ¶ 72 (deciding to continue with renovations and to ex 73 (refusing to liquidate Bradford regardless of bleak financial future).

[39] ThereThere can be no doubt that PlaintiffsThere can be no doubt that Plaintiffs have allegedThere can be no doubt that OfficerOfficer Defendants, who areOfficer Defendants, who are plainly alleged to have had andOfficer Defendants, who are plainly alleg

SectionSection 3(a)Section 3(a) of the 1933 Act exempts several categoriesSection 3(a) of the 1933 Act exe

ofof the Act s provisions.of the Act s provisions. Pursuant to subsection (4), any security issued by a personof th

operatedoperated exclusively for reloperated exclusively for relioperated exclusively for religious, education

purposespurposes and not for pecuniarypurposes and not for pecuniary profit is exempt. The subsectionpurpose

fromfrom the registration requirementsfrom the registration requirements of tfrom the registration requiremen

coverscovers all securities covers all securities whether or covers all securities whether or not exempted , exc

andand (14) of §3(a). Only if the Bradford bonds qualify under these later exclusions is Advesand (14) of §3(a

from Section 12 liability.

AdvestAdvest contends that because the formal issuer of the bonds Advest contends that because the formal i

FinanceFinance Agency, a body politic of the Commonwealth, the bonds are exempt under the provision

forfor governmental issuers, subsection (2). But neither MIFA or any other division of the

CommonwealthCommonwealth had any obligationCommonwealth had any obligation to makeCommonwealth h

thethe obligation of Bradford. Thisthe obligation of Bradford. This type of municipal bond financing isthe oblig

becausebecause the state entity issuing the bonds is merelybecause the state entity issuing the bonds is merely a con

andand the resources and credit of the state or municipality do not stand behind the financingand the resource

generally,, United States v. Massachusetts Industrial Finance Agency, 910 F.Supp. 21,, 910 F.Supp. 21, 24 (D. Mas

1996).

IfIf the pIf the priIf the private parties who are the beneficiaries of conduit financing are exempt from

registrationregistration and antifraud provisions of the securiregistration and antifraud provisions of the secu

§3(a)(2),§3(a)(2), substantial danger exists for investors. The SEC recognized the potential for abuse as far

backback as 1968, when it promulgated Rule 131, 15 CFR §back as 1968, when it promulgated Rule 131, 15 CFR

itsits position that more than one security is offered its position that more than one security is offered and iits p

thethe underlying agreement by the private entity that received the proceeds of a conduit financing to

repayrepay those monies was a separaterepay those monies was a separate security distinct from therepay those r

RecogRecogniRecognizingRecognizing that the typical conduit financing arrangement represents a financing

company , it analyzed the situation as follows:

> TheThe municipality of other governmental units usualThe municipality of other government
> obligationobligation under the bond, except to thobligation under the bond, except to the extobli
> receivedreceived from thereceived from the private company to thereceived from the private comp
> TheThe inThe investor cannot look to the municipality for interest payments or
> repaymentrepayment of the principal; herepayment of the principal; he can onlyrepayment of the
> failurefailure offailure of the private company. The municipality serves as afailure of the private co
> whichwhich the amounwhich the amounts paywhich the amounts payable under the lease ar
> private companyprivate company to the bondholder. <u>In these circumstances, the investor is</u>
> <u>offeredoffered an interest in an offered an interest in an obligoffered an interest in an obli</u>
> <u>security security within the meaning of the securiti security within the meaning of the se</u>
> <u>benefitbenefit of the disclosurebenefit of the disclosures requirebenefit of the disclosures requi</u>
> <u>Securities Exchange Act of 1934 when applicable.</u> (emphasis added)

IndustrialIndustrial Revenue Bonds, Notice of Proposed Rulemaking, 33 FR 3Industrial Revenue Bonds, Notice

Comm.,Comm., FebComm., February 16, 1968). The SEC has also recognized that there are two issuers in co

financings,financings, the official government entity and thefinancings, the official government entity and the oblig

e.g.e.g. 15 CFR 240.15c2-12(f)(4)(issuer of municipal securities defined as governmental e.g. 15 CFR 240

specifiedspecified in section 3(a)(29) of the Act and the issuer of any separate sespecified in section 3(a)(29)

followsfollows that if the separate security is nofollows that if the separate security is not exempt from foll

involvedinvolved in the offering must meet the requirements of the Act.involved in the offering must meet the rec

of Proposed Rulemaking, 33 FR at 3142-43.

Courts,Courts, commentators and even Congress have acceptCourts, commentators and even Congress have

ActAct regarding the existence of two securities in conduit financing transactions. See, <u>McCay v. Juran</u>

<u>&& Moody</u> 1998 WL 1780694 *5 (D. N.D.,1998) (finding a separate non-exempt security in a 1998 WL 1780694 *

financingfinancing for purposes of North Dakota Bfinancing for purposes of North Dakota Blue Sky lawsfinan

Regulation,, sec. 4.3[A][1] (, sec. 4.3[A][1] (5th e, sec. 4.3[A][1] (5th ed., 2005); Louis Loss and Joel S

SecuritiesSecurities Regulation, pp. 268-72 (3d ed. 1995). The most concrete, pp. 268-72 (3d ed. 1995). The mos

aa separate securitya separate security in conduit financing is the action taken by Congress when it decided, agains

SEC sSEC s wishes, to not require registration of many ofSEC s wishes, to not require registration of many of the b

InsteadInstead of amending the§ 2(1) definition of security to clarifyInstead of amending the§ 2(1) definition of

oror were or were not securor were not securities under the 1933 Act,[40] in 1970 it expanded the exemption u

specificallyspecifically exempting any security which is an industrial development bond that bears interest

thatthat is excludable from gross income under spethat is excludable from gross income under specithat is exc

Code. See Pub.L. 91-373, Title IV, §401(a).[41]

PlaiPlainly,Plainly, if Congress intended alPlainly, if Congress intended all securities issued b

automatautomaticallyautomatically exempt from the 1933 Act, it would not have amended the statute to speci

exemptexempt cerexempt certain types of conduit financing issues; the existing form of the statute would e

providedprovided suchprovided such an exemption. Congress action implicitly recognizes that someprovided su

sesecuritiessecurities are not exempt, even when a body politic of a state has formally issued the ssecurities a

FurtFurther,Further, there must be some significance that Congress did not exempt all types of tax-exempFur

municipalmunicipal securities permitted by the tax code, but omunicipal securities permitted by the tax code, b

bonds.

AdvestAdvest contendsAdvest contends that only those types of conduit financings directly within the scop

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40 ContrastContrast Pub.L. 10Contrast Pub.L. 105-5Contrast Pub.L. 105-554 § 1(a)(5) which deleted non-security b definitiondefinition of security in Securities Exchange Act of 1934 through thdefinition of security in Securities Exchange CongressionalCongressional action,Congressional action, which was also taken in response to a regulatory position that Congress disapp Congress will clarify the definition of security if it believes a regulatory agency has incorrectly interpreted it.

41 The actual text of the provision is set forth in footnote 45, infra.

131,131, which is 131, which is limited to fin131, which is limited to financing for the benefit of an industrial createcreate separate securities. It asserts that if the Bradford offering did not fall within Rule 131, no non-exemptexempt separate security exists. Advest mexempt separate security exists. Advest misunderstexempt se itsits powers. While the SEC has some discretionits powers. While the SEC has some discretion to define what typ itit does not have the ability to create a security .it does not have the ability to create a security . it does no understandsunderstands a security to exist under theunderstands a security to exist under the 1933 Act. Aunder IfIf aIf a debt instrument falls within the definition, whether the SEC acknowledges itIf a debt instrument falls with to the Act s requirements.

Thus,Thus, merely because the SEC did not include conduitThus, merely because the SEC did not inclu entitiesentities within the scope of Rule 131 does not mean separate sentities within the scope of Rule 131 d revenuerevenue bondrevenue bond financings.[42] If separate securities exist in conduit financings If separate securi notnot a state or municipal entity, stands behind the ultimate payment, inot a state or municipal entity, stands treatmenttreatment of the offering is determined by thetreatment of the offering is determined by the industtrea otherother provisions. There is no reasonother provisions. There is no reason under the securities laws whyother in one type of conduit financing, but not another.

ThisThis is borne out by McKay v. Juran & Moody, Inc. 1998 WL 1780694 *5 (D. 1998 WL 1780694 *5 (whichwhich involved a North Dakota Blue Sky Act claim[43] for for f for failing to register certificates o participationparticipation in lease agreements that defendants soldparticipation in lease agreements that defendants

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[42] ThereThere is a reason why the SEC only included industrialThere is a reason why the SEC only included industrial re andand not municipal bond conduitand not municipal bond conduit financings involving non-profit entities. and not municipal bond cond toto require the private entitiesto require the private entities profiting from industrial revenue bondto require the private entities profiting fr Bradford,Bradford, and other educational,Bradford, and other educational, benevolent and non-profit entities, however, are exempt from §3(a)(4).§3(a)(4). There§3(a)(4). There is no reason to include them within the scope of Rule§3(a)(4). There is no reason to include th expanded, such entities, unlike private for profit companies, would be exempt from registration in any event.

[43] TheThe plaintiff s federal securities claims were dismissed on stThe plaintiff s federal securities claims were dismis 1780694 *3.

issued by North Dakota counties, and defendants, like Advest here, claimed they qualifiedissued by North Dakot statutorystatutory exemption for securities issued by a state estatutory exemption for securities issued by a state werewere similwere similar, but distwere similar, but distinct, from revenue bonds, and the municipal iss responsibilityresponsibility for their payment. The District Court examined Rule 131,responsibility for their payn ofof Rule 131 apply in this case, even thouof Rule 131 apply in this case, even though the certiof Rule 131 a ItIt found that therIt found that there were twIt found that there were two separate securities, one issued by the partyparty responsible for repayment. Because the later wasparty responsible for repayment. Because the later exempt.

TheThe same resultThe same result applies here.The same result applies here. The Bradford bonds compr MIFA, and the second, which contained the College s promise ofMIFA, and the second, which contained the Co BecauseBecause Bradford is exempt fromBecause Bradford is exempt from registration as an educational entity, t registerregister the Bonds. Butregister the Bonds. But because entities qualifying for the subsection (4) exemption frfromfrom Sfrom Section 12, Advest can be held liable for any misstatements in any prospectus pursuant to which the securities were sold.

2. NeitherNeither the structure of exemptionsNeither the structure of exemptions permitted un purposepurpose of the purpose of the gopurpose of the governmental issued security e position.

AdvestAdvest claims that the tax exempt status of bond issuaAdvest claims that the tax exempt status exemption.exemption. While Congexemption. While Congress exemption. While Congress did expand the developmentdevelopment bonds in 1970, there is no doubt that the Brdevelopment bonds in 1970, there is

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[44] AlthoughAlthough not expressly stated, theAlthough not expressly stated, the financing wouldAlthough not expressly ofof the certificates of participation was toof the certificates of participation was to fund the constructionof the certificates of participatio Indeed,Indeed, Rule 131 could not apply under any circumstances since the violation alleged wIndeed, Rule 131 could not apply unde NorthNorth Dakota s securities laws. Rule 131, eNorth Dakota s securities laws. Rule 131, evNorth Dakota s securities laws. Rule 131, ever NorNor does it purport to identify what constitutes a security under state securities statutes. Nor does it purport to identify what constitute to have had a state equivalent of Rule 131.

exemptions exemptions parameters,[45] the bonds are not industrial revenue bon the bonds are not industrial rev

theirtheir behalf excluded from gross income on account of the specific tax code provisionstheir behalf excluded

statute.[46] Nor can Advest claim Congress Nor can Advest claim Congress intended Nor can Advest claim Cong

CongressCongress passed only a narrow exemption in 1970. If Congress intended to exempt all conduit

financingsfinancings that benefited taxfinancings that benefited tax exempt entities such as Bradford, it would have

exemptionexemption or amended Section 12 so it noexemption or amended Section 12 so it no longer applied to se

(4)(4) and (14) of §3(a), instead of just (2) and (14). By granting institutions such (4) and (14) of §3(a), instead

exemptionexemption from registration, Congress clearly did not iexemption from registration, Congress clearl

institutions enjoy a broad exemption from the antifraud provisions of the 1933 Act.

Advest strongly reliesAdvest strongly relies on JudgeAdvest strongly relies on Judge Zobel s opinion in

77497749,7749, Fed.Sec. L. Rep. ¶ 93,173 (D. Mass. 1987) and two other cases In re Bexar County In re Bexar

FacilityFacility Development Corp. Sec. Litigation, 125 F.R.D. 625 (E.D. Pa. 1, 125 F.R.D. 625 (E.D. Pa. 19

CambridgeCambridge Partners, LLC 2003 WL 229921, Fed. Sec. L. Rep. ¶ 92,650. These cases merely focus

onon whether the debt instrument at issue fell within Rule 131.on whether the debt instrument at issue fell within

whetherwhether separate securities exist in the conduit financings regardless of the literal applicability of

RuleRule 131. Rule 131. Indeed Bexar County purports to require purports to require proof that Congress intended t

entitiesentities of their purported exemption from Section 12 s antifraud provision. Thentities of their purpor

---

[45] TheThe 1970 amendment to subsection (2) expanded the exemptionThe 1970 amendment to subsection (2) expanded th industrialindustrial development bond (as defined inindustrial development bond (as defined in sectionindustrial development bond (as de income under section 103(a)(1) of Title 26income under section 103(a)(1) of Title 26 if, by reason of the application of paragraph (4) o TitleTitle 26 (determined as if paragraphs (4)(A), (5), and (7) were noTitle 26 (determined as if paragraphs (4)(A), (5), and (7) were n such section 103(c) does not apply to such security.

[46] InIn any event, it appears that this exemption is no longer available. When CongresIn any event, it appears that t Internal Revenue Code in 1986 it completelyInternal Revenue Code in 1986 it completely overhauledInternal Revenue Code in 1986 it developmentdevelopment bonds no longer exist under the Code, and the specific statutesdevelopment bonds no longer exist under the toto qualify for the exemption no longer exto qualify for the exemption no longer exist.to qualify for the exemption no longer exist. necessary for qualification of the exemption, Congress must be presumed to have eliminated the exemption.

ignoresignores Congress ignores Congress clear mandate that charitable and educational entities should only be ex

thethe 1933 Act s registration provisions because Congressthe 1933 Act s registration provisions because Congres

securities from Section 12.

Finally,Finally, the CourFinally, the Court must coFinally, the Court must consider whether expa

exemptionexemption to cover theexemption to cover the types of private entities Congress deliberately chose not t

isis consistent with the policies of the federal securities laws. This consistent with the policies of the federal se

AlloydAlloyd Company, 513, 513 U.S. 561, 571 (1995) has already cautioned against interpreting §3(a)(2) to illogically allow this exemption to be enjoyed by private entities.

> WhyWhy would Congress grant immunity to aWhy would Congress grant immunity to a pWhy recissionrecission suit for no reason otherrecission suit for no reason other than that the seller sreci toto relate to securities issued by a government entity?to relate to securities issued by a governmen TheThe anomaly disappears, however, when theThe anomaly disappears, however, when the term toto documents that offer to documents that offer securities to documents that offer securitie eexexemptionexemption for government-issued securities makes perfect sense on that vieview,view, view, for it then becomes a precise and appropriate means of giving immunity to governmental authorities.

PermittingPermitting the government-issued security exempPermitting the government-issued security ex

underwritersunderwriters does not serve the precise and appropriunderwriters does not serve the precise and ap

itit clearit clear that §3(a)(2) is designed to protect true government financings. Applying the exemption to

aa private party Congress did not ora private party Congress did not origia private party Congress did not o

unnecessarilyunnecessarily expands an exemption that is supposed to be construed narrowly to effectuate its purpose.

B. Plaintiffs Have Properly Pled The Elements of a Section 12(a)(2) Claim

1. Rule 9(b) Pleading Standards Do Not Apply To This Count

FraudFraud isFraud is not anFraud is not an element of a Section 12 claim and Plaintiffs are not required to p oror reliance. Gustafson v. AllGustafson v. AlloydGustafson v. Alloyd Co. 513 U.S. 561, 582 (1995); Consequently,Consequently, Rule 9(b) heightened pleading standards do not apply to a Section 12Consequently thethe claim sounds in fraud. the claim sounds in fraud. Section 12 claimsthe claim sounds in fraud. allegationsallegations of scienter or reliance. Shaw, 82, 82 F.3d, 82 F.3d at 1223. Nor do claims based on negliger Number Nine, 51 F. Supp. 2d at 13.

Here,Here, in contrasHere, in contrast toHere, in contrast to Plaintiff s Rule 10b-5, fraud and negligent PlaintiffsPlaintiffs do notPlaintiffs do not allege that they relied onPlaintiffs do not allege that they relied on the f ¶¶ 92 with AC, ¶¶ 85, 97 and 100.¶ 92 with AC, ¶¶ 85, 97 and 100. Also, in contrast to their Rule 10b-5 and frau onlyonly allege negligentonly allege negligent conduct in Count III as opposedonly allege negligent conduct in C counts.[47] Compare AC, ¶ 90 with AC, ¶¶ 83, 97. Accordingly the Amended Complain Compare AC, ¶ 90 witl sound in fraud and Rule 8 pleading rules apply to this claim.[48]

2. PlaintiffsPlaintiffs have appropriately pled that Plaintiffs have appropriately pled that

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[47] PlaintiffsPlaintiffs do altern atively plead that Adve st knew a bout the false statements Plaintiffs do alternatively plead tl but such a n allegation d oes not co nvert their claim into one w hich sounds in fraud.

> AlthoughAlthough theAlthough the complaint does assert that defendants actually possessed the information that theythey failed to disclose, those allegations cannot be thought to constitute averments othey failed to disclose, those alle absentabsent any claim of scienter and reliance. Otherwise, any allegatabsent any claim of scienter and reliance. materialmaterial information would be transformedmaterial information would be transformed into amaterial inform 9(b).

Shaw, 82 F.3d at 1223. See also Number Nine, 51 F. Supp.2d at 13.

[48] AAdvAdvestAdvest asserts that because the Plaintiffs are pleading the same misstatements and omissions under theirtheir Rule 10b-5 and Sectiontheir Rule 10b-5 and Section 12 claims, the latter necessarily sound in fraud. However, to conserve juc andand to avoid duplicative actions, the same misrand to avoid duplicative actions, the same misrepresenand to avoid duplicative actic Howev er,However, the PlaintiffsHowever, the Plaintiffs may not submit any evidenceHowever, the Plaintiffs may not submit any evide conductconduct was done knowingly, intentionally, or with reckless disregard forconduc t was don e know ingly, intention ally, or with reck

materially false statements and misleading material omissions.

AdAdvestAdvest correctly states that the same misrepresentations and omissions that constituAdvest co

Plaintiffs Plaintiffs Rule 10b-5 claims, are also thePlaintiffs Rule 10b-5 claims, are also the misstatements and

SectionSection 12 claim. For the reason set forth in Section I, the PlaiSection 12 claim. For the reason se

allegationsallegations to state a claim under the most stringent standard. Consequently, they meeallegations to

rigorousrigorous Rule 8 standardrigorous Rule 8 standard that appliesrigorous Rule 8 standard that applies to this

not need to add anything further.

3. Plaintiffs have standing as purchasers in the initial offering

PlaintiffsPlaintiffs have alleged that they purchased theirPlaintiffs have alleged that they purchased their

solesole underwriter for the May 1998 public offering. AC, ¶¶ 13, 90. sole underwriter for the May 1998 public o

especiallyespecially from the size of the positions taken by the Institutional Bondholders, that Plaintiffs

purchasedpurchased their holdingspurchased their holdings in the primary offering and not in the secondary mark

isis nois not a reasonable inference, Plaintiffs, all of whom are initial purchasers, can amend their

complaint to repair this technical error.

III. PLAINTIFFSPLAINTIFFS HAVEPLAINTIFFS HAVE PLAINTIFFS HAVE STATED MASSACHUSETTS STATUTORY AND COMMON LAW CLAIMS

TheThe Amended Complaint includes five claims under Massachusetts Law: vThe Amended Complain

UniformUniform Securities Act, M.G.L. c. 110, § 410; violation of Chapter 93A;Uniform Securities Ac

misrepresentation;misrepresentation; and breachmisrepresentation; and breach of fiduciary duty to creditors.mis

fiduciary duty claims, but have stated viable causes of action for the remaining state law counts.

A. PlaintiffsPlaintiffs Have Stated ClaimsPlaintiffs Have Stated Claims Against All Defendants For V Securities Act

TheThe Massachusetts version of the Uniform SecuriThe Massachusetts version of the Uniform SecuritiesTh securitiessecurities ofsecurities offerings isecurities offerings in the Commonwealth, but contains only misrepresentationsmisrepresentations and omissions, misrepresentations and omissions, § 410. MMarram v. Ko 50,50, 809 N.E. 2d 1017, 1025 (2004) (Marram)). Sec). Section 410(a)(2) provides a cause of action againstagainst any person that offers oragainst any person that offers or sells a security by means of any untrue st or any omission of a material fact. Section 410(b) also provides liability for

> EveryEvery person who directly or indirectly controls a seller liablEvery person who dire subsectionsubsection (a), subsection (a), esubsection (a), every partner, officer, or director of personperson occupying a similar status or performiperson occupying a similar status or perfo employeeemployee of such a seller who materially aids in the sale, andemployee of such a seller w dealerdealer or agent who materially aids in tdealer or agent who materially aids in the saldea severally with and to the same extent as the seller. . .

TheThe Amended Complaint alleges that BradfordThe Amended Complaint alleges that Bradford and Advest are PlaintiffsPlaintiffs seek to hold the Bradford Defendants, as officers, directors and control persons of Bradford, liable under subsection (b).

1. TheThe The MaThe Massachusetts Uniform Securities Act Applies To An Offering Massachusetts Securities

AllAll DefendantsAll Defendants contest the Plaintiffs standing to bring claims under Ch. 110AAll Defend thatthat the complaint does not allege where the bonds werethat the complaint does not allege where the bonds we statute,statute, however, is not correctly stated by the Defendants, statute, however, is not correctly stated by SectionSection 414(a) statesSection 414(a) states that § 410 applies to persons who sell or offer to sell whenSecti isis made in the commonwealth,is made in the commonwealth, or (2) an offer to buy is made andis made in the co Subsections (c) and (d) elaborate when these conditions have been met. Subsection (c) states:

> ForFor the purpose of this section, an offeFor the purpose of this section, an offer tFor the

> commonwealthcommonwealth,commonwealth, wcommonwealth, whether or not either par commonwealth,commonwealth, whencommonwealth, when the offer (1) originates from thecomm is directed by theis directed by the offeroris directed by the offeror to the commonwealth and rec which it is directed. . .

TheThe Amended Complaint specifically alleges thatThe Amended Complaint specifically alleges that Bradford,

statestate offices, offered the securitiesstate offices, offered the securities to the Plaintiffs.state offices, offered th

Bradford sBradford s offerBradford s offer originated in the Commonwealth,Bradford s offer originated in t

aa security be made in the Commonwealth. Indeed, it is inconceivable that aa security be made in the Comm

MassachusettsMassachusetts stateMassachusetts state agency on behalf of a Massachusetts educational institution

toto to orito originate in Massachusetts. Where the Plaintiffs were located and whether Advest sold the

securitiessecurities from theirsecurities from their main office isecurities from their main office in Hartford

specificallyspecifically statesspecifically states that the presence of the buyers or the sellers inspecifically states

offer or sale is unnecessary.

2. TheThe Bradford Defendants cannot escape liability as theThe Bradford Defendants canno ofof the entity that issued a misleading Officof the entity that issued a misleading Of Advest underwrote a firm commitment bond offering.

Section 410(b) Section 410(b) establishes broad Section 410(b) establishes broad secondary liability for fi

specifiedspecified relationships with a primaryspecified relationships with a primary violator. However,specifie

seller seller for seller for such liability to seller for such liability to arise; the statute does not impose liability

oror broker/dealersor broker/dealers of §410(a)(2) violators who only offer a security. Relyingor broker/dealers o

authority,authority, the Bradford Defendantsauthority, the Bradford Defendants argue that only Advest, the unde

seller and, consequently, they must be dismissed.

TheThe Bradford Defendants argumentThe Bradford Defendants argument arises out of Pinter v. Dahl,

aa United States Supreme Court decision interpa United States Supreme Court decision interpreting a United S

19331933 Act. The Court ruled that sellers are limited to1933 Act. The Court ruled that sellers are limited

plaintplaintiffplaintiff and any other person who successfully solicited the plaintiff s purchase of securiplain

providedprovided the solicitor was motivated at least in part by a desireprovided the solicitor was motivated at l

oror those of the security owner. or those of the security owner. Id. The Court specifically rejected an alternativ

seller, seller, adopted seller, adopted by numerous lower courts, that would also hold liable seller, adopted b

a substantial factor in causing the transaction to occur. Id. at 648-51.

InIn Shaw, the First Circuit, the First Circuit examined the effect of Pinter in a firm in a firm commitment u

suchsuch as the one alleged in the Amended Complaint, in a Section 1such as the one alleged in the Amended C

WhereWhere the underwriter purchaseWhere the underwriter purchases the entire iWhere the underwriter pur

underwriterunderwriter is the person who has transferred title to the purchaser. Accordinunderwriter is the pers

thethe issuer and its officers, notwithsthe issuer and its officers, notwithstanding any the issuer and its offic

statementsstatements in the prospectus, are notstatements in the prospectus, are not liable unlessstatements in the

Id. at at 1216. Such solicitation, the Court found, does not occur when the at 1216. Such solicitation, the Court fou

toto it participate in the preparation of the prto it participate in the preparation of the prosto it participate

securitiessecurities offering. Id. There must be factu There must be factual alleg There must be factual all

survive a Rule 12(b)(6) motion. Id.

TheThe mechanical applicationThe mechanical application of theThe mechanical application of the definiti

asas the elevation ofas the elevation of form over substance. For no valid reason, an issuer and his officers and dire

cancan be held liable for Scan be held liable for Sectcan be held liable for Section 12 violations in a best-effo

underwriterunderwriter effectivelyunderwriter effectively acts as the issuer s agent but have no liability, despite

forfor the contents of the prospectus, in a firm commitment underwriting. 3Bfor the contents of the prospectus, in

SecuritiesSecurities and Federal Corporate Law (2d. Ed. 2004), §Securities and Federal Corporate Law (2d. Ed. 2

thisthis senseless result bethis senseless result be carried over to the Uniform Securities Act. But the structure ofth

ActAct is significantly diAct is significantly diffeAct is significantly different than the 1933 Act, and the purp unthinkingunthinking adounthinking adoptunthinking adoption of federal precedent. Moreover, there is evid UniformUniform Act did not intend issuers and their control peUniform Act did not intend issuers and their c circumstacircumstances.circumstances. Not scircumstances. Not surprisingly, therefore, the sole state Suprem whetherwhether an issuer responsible for a misleawhether an issuer responsible for a misleadingwhether an issuer res bebe a statutory sebe a statutory sellbe a statutory seller under the Uniform Securities Act has rejected the resultresult the Massachusetts Supreme Judicial Court would likely reach were it faced with the issue. ForFor the reasons set forth below, the Institutional Bondholders canFor the reasons set forth below, the Institutio Bradford with regard to this offering.

a. TheThe Uniform Securities Act did not intendThe Uniform Securities Act did not in inin public offerings ain public offerings and in public offerings and the op purposes of the civil liability provisions.

TheThe purpose of §410(a)(2) isThe purpose of §410(a)(2) is to create a strong incentive for sellers of sec fufullyfully all materifully all material facts about the security. Marram, 442 Mass at 51, 809 N.E. 2d at 102 allowingallowing rescission wiallowing rescission without proofallowing rescission without proof of scienter, providesprovides a heightened deterrent to prevent misrepresentations. provides a heightened deterrent to prevent m furthersfurthers this deterrent effect by imposing joint and several personal liability on pfurthers this deterrent e withwith the primary violator who are in a position with the primary violator who are in a position towith the contcontrocontrolcontrol persons, officers, directors, partners, and all persons having a similar status or fulfilling similarsimilar function, as wellsimilar function, as well as those employees who materially aided in thesimilar fun IfIf the seller employsIf the seller employs aIf the seller employs a broker/dealer or other agent to aid in the sale t if he materially aided in the sale.

InIn a In a public offerinIn a public offering where the issuer is the seller, this circle of secondary liabi

eminenteminent sense.eminent sense. These control persons, employees and agents are generally the persons resp forfor the offering memorandum that is required ifor the offering memorandum that is required in pubfor th liabilityliability provides liability provides the inliability provides the incentive to assure the complete and acc of the statute, regardless of the solvency or financial condition of the issuer.

SecondarySecondary liability, however, is distributed irrationally in public offerings where an underwriterunderwriter is deemed to be the sole seller. Liability is no longer coterminousunderwriter is deemed t InIn a firm commitment offering managed by an underwriter ofIn a firm commitment offering managed by an unde officersofficers and directors of theofficers and directors of the underwriter would be able to influenceofficers an Bradford,Bradford, much lessBradford, much less insure their accuracy.Bradford, much less insure their accuracy failfail because high level executives of a sizable unfail because high level executives of a sizable underwriter c qualifyqualify for the reasonable care defense providqualify for the reasonable care defense provided by liabilityliability of aliability of a broker/dealer makes no sense. liability of a broker/dealer makes no sense. The u aanother.another. At the same time, the persons who have the most culpability for misstatemeanother. At t prospectus,prospectus, those affiliated with the issuer, haveprospectus, those affiliated with the issuer, have no th notnot not even as an aider or abettor. When seller is too narrowly construed, many of the snot even as an a incentivesincentives for accurate disclosure are lost, while much of the remaining liabiincentives for accur ineffective or serve no purpose.

DueDue to the different structure of the Securities Act ofDue to the different structure of the Sec definitiondefinition of seller does not create anomalous sedefinition of seller does not create anomalous SecuritiesSecurities Act. Unlike the Uniform Act, the Securities Act has two primarySecurities Act. Unlike the Uni oneone for sellersone for sellers who make false statements (§12, 15 U.S.C. § 77l) and a secondone for sellers who

[49] ItIt isIt is precisely for this reason Plaintiffs have notIt is precisely for this reason Plaintiffs have not named the officers technically viable claims against them exist.

aa false registration statement (§a false registration statement (§ 11, 15 U.S.C. §a false registration statement (§ 11,

19331933 Act,1933 Act, § 15, 15 U.S.C. § 77o, reaches both violations.1933 Act, § 15, 15 U.S.C. § 77o, reach

eveneven if the officers and directors of the issuer cannot be held even if the officers and directors of the

prospectusprospectus as the control person of a prospectus as the control person of a Sectprospectus as

responsibilityresponsibility for such statemenresponsibility for such statements becauseresponsibility fo

misrepresentationsmisrepresentations in a registmisrepresentations in a registrationmisrepresentations in a registrat

anan incentive to provide accurate disclosures toan incentive to provide accurate disclosures to the persons who

thethe Uniform Act, however, has a single civil liability provision, narrowing the definition of seller

confounds the incentives of the Act.

GivenGiven this background, it is not surprising that there is evidence that the drafters of the

UniformUniform Securities Act did nUniform Securities Act did not intend issUniform Securities Act did

MassachusettsMassachusetts adopted the Uniform Securities Act in 1972, and it was promulgatedMassachusetts a

LawsLaws Commission in 1956,Laws Commission in 1956, decades before the SupremeLaws Commission in 195

definitiondefinition definition of seller. Although the commentary to the 1956 draft of the Uniform Act doe

addressaddress who should be deemed a seller under §410(a)(2), comments to the 1985 revision address who

UnifoUniformUniform Act indicate that issuers should be sellers under the Uniform Act s civil liabilitU

provisions.

TheThe 1985 revision of the Uniform Securities Act restructured the priorThe 1985 revision of the Unif

TheThe prohibition against selling The prohibition against selling a securitThe prohibition against selling a se

movedmoved to §501(2) and the private rmoved to §501(2) and the private rightmoved to §501(2) and th

However,However, theHowever, the civil liability provisions, with one exception notHowever, the civil liability

bebe substantively changed by the revisions.[50] Section 605 (a), the primary vi Section 605 (a), the prin

continuedcontinued to impose liability on a person who offers to sellcontinued to impose liability on a person who

22 to §605 plainly stated tha2 to §605 plainly stated that2 to §605 plainly stated that seller s liability under

includedincluded persons whose participation wincluded persons whose participation was a sincluded perso

definition that would clearly cover issuers who published false prospectuses:

> SectionSection 501(2) follows closely Section 12(2) of the Securities Act of 1933 whichwhich imposes liability for material misrepresentatwhich imposes liability for material mis disclosuresdisclosures given to buyers. *AsAs inAs in the case with the latter, liability may be imposedimposed on a person in addition to the immediate seller if the person s participationparticipation was a substantial contributiveparticipation was a substantial contributi* Davis v. Avco Financial, 739 F.2d 1057 (6th Cir. 1984)(emphasis added).

Indeed,Indeed, to confirm that officers andIndeed, to confirm that officers and directors ofIndeed, to confirm that of

thethe secondary liability provision, § 605(d),[52] no longer no longer limited no longer limited the liability of contro

andand directors to persons who were related to a violating seller. Section 605(and directors to persons who w

personperson related to a violator of Section (a) is liable, regardless operson related to a violator of Section (a)

---

[50] CommentComment 1 to §605 of the 1985 revision Comm ent 1 to §60 5 of the 198 5 revision sta teComment 1 to exception of subsection (c)[relating to market manipulation], is not intended to alter significantly existing law.

[51] Section 60 5(a) of the 19 85 revision of the Unifo rm Securities Act states in re levant part:

> AA person w ho offers to sell or sells a security in violation of Section 50 1(s) .A person who offe rs to sell or sells a se one who purchases the security from that person.

[52] Section 60 5(s) of the 19 85 revision of the Unifo rm Securities Act states in re levant part:

> A personA person who direc tlyA person who directly or indirectly controls another person who is liable under subsec (a)(a) or (c), a partner, officer, or director of the person liable, a person occupying a(a) or (c), a partne r, officer, or statusstatus or performing similar functions, an emstatus or perfo rming simila r functions, an emplostatus or perfor mamaterialmateriallymaterially aids in the act, omission, or transaction co nstituting the violation, and a broker-dealerdealer of sales representative who materially aids in the act, omission, or transaction constitutingconstituting th e violation, are also liableconstituting th e violation, are also liable jointly and seve rally with a the other pe rson . . .

merelymerely offered to sell.[553] This clarification confirms liability of individuals in the Bradford Defendants Defendants position in a firm commitment underwriting when the prDefendants position misrepresentations.

Plaintiffs,Plaintiffs, of course, recognize that Massachusetts has not adoptedPlaintiffs, of course, recogniz UUniformUniform Securities Act. However, when the drafters of a statute adopted by the MUniform Securit LegislatureLegislature clarify what they intended whenLegislature clarify what they intended when the original st isis entitled to weight in construing the statute. <u>Cf.</u> <u>Kale v. Combined Insurance Co.</u>, 861 F.2d 746, 752,752, n.7 (subsequent legislative statements are entitled to interpre752, n.7 (subsequent legislative statemen intent of original body is unclear).

PlaintiffsPlaintiffs have been able to only find one court in aPlaintiffs have been able to only find one court i SecuritiesSecurities Act thSecurities Act that has squarely addressed the issue of who is a seller in a firm underwriting,underwriting, and thatCourtunderwriting, and thatCourt has repeatedly ruled that the purposes of th issuerissuer is recognized as a selleissuer is recognized as a seller. The Supissuer is recognized as a seller. <u>HabermanHaberman v. Washington Public Power SupplyHaberman v. Washington Public Power Supply System</u> aa bondholders sua bondholders suit aa bondholders suit arising out of the infamous Washington Pu (WPPSS)(WPPSS) default in the mid 1980s.(WPPSS) default in the mid 1980s. The(WPPSS) default in statestate of Washington that had issued bonds to construcstate of Washington that had issued bonds to construc plantsplants far exceeded original estimates and the agency defaulted onplants far exceeded original estimates an bondsbonds shortly after constructbonds shortly after construction of thbonds shortly after construction o BondholdersBondholders brought suit under theBondholders brought suit under the civil liability provision of Wa

[53] TheThe Bradford Defendants have practically conceded that if § 410(b) liability extended to officers and directorsdirectors ofdirectors of a violator of subsection (a)(2), as opposed to only a seller who has violateddirectors of a violator of su they are persons who could be found liable under subsection (b).

thethe Uniform Securities Act against the issuerthe Uniform Securities Act against the issuer and other persons w

inin the sale of the bonds. The trial court dismissed the bondholders claim on the ground that the

bondsbonds were sold in a firm commitmentbonds were sold in a firm commitment underwriting and only thebonds

Washington s securities laws for selling the bonds to the plaintiffs.

RecognizingRecognizing that Washington s stRecognizing that Washington s staRecognizing that Wasl

SecuritiesSecurities Act, the Washington SupremeSecurities Act, the Washington Supreme Court surveyed the ap

courtscourts on how to define seller.[54] After reviewing the approac After reviewing the approache After

concludedconcluded that liability should attach when the defendaconcluded that liability should attach when

bringingbringing about thebringing about the transaction. 109 Wash 2d atbringing about the transaction. 109 V

influencedinfluenced by theinfluenced by the Commentary to the 1985 Revision to the Uniform Securities Act cit

ItIt wasIt was particularly concernedIt was particularly concerned that too narrow a definition would defeat the re

statutestatute in firm underwritten bond issustatute in firm underwritten bond issuestatute in firm underwritten b

supported the remedial purposes of the Act.

The Court explained its ruling with the following:

> OurOur substantial contributive factor analysisOur substantial contributive factor analysis simply e apapproachapproach to sellers so as to include those parties who have the attributeapproach to se aa seller and thus who policy dictates should be a seller and thus who policy dictates should RCWRCW 21.20.430(1) [theRCW 21.20.430(1) [the WRCW 21.20.430(1) [the Washington sta who would escape primary liability for want of privity.
>
> Here,Here, for example, the Supply System sold all the bonds toHere, for example, the Supply Syste thenthen sold them to plaintiffs then sold them to plaintiffs and interthen sold them to plainti privityprivity for liability under RCW 21.20.430(1),privity for liability under RCW 21.20.430(1), or potentiallypotentially liable for prospectus fraud, cutting off allpotentially liable for prospectus frau thethe issuer of the bonds and others acting the issuer of the bonds and others acting togethethe i thethe actual beneficiaries of the sale proceeds. Thethe actual beneficiaries of the sale proceed

[54] TheThe Court noted that the federalThe Court noted that the federal courts interpretation of stateThe Court noted that th becausebecause the federbecause the federa because the federal courts usually only repeated what their circuit had ruled with regard t interpreting the state enactment. 109 Wash 2d at 129, 744 P. 2d at 1051.

> securitiessecurities to insulatesecurities to insulate themselves from liability to ultimate purchasers byby selling toby selling to middlemen beyond their control,by selling to middlemen beyond their know that the securities will be resoldknow that the securities will be resold immediately to buyer onon Officialon Official Statements and Annual Reports written by the issuer toon Official Statem thethe sales. Unlikethe sales. Unlike the federalthe sales. Unlike the federal Securities Act of 1933, § provideprovide for separate issuerprovide for separate issuer liability. Thus, ifprivity were required underunder RCW 21.20.430(1), an under RCW 21.20.430(1), an issuer iunder RCW 21.20.43 wouldwould never be liabwould never be liablwould never be liable, regardless of its culpabili contrary to the clear purposes of the WSSA.

109 Wash 2d. at 132, 744 P.2d at 1052.

Haberman was was decided before Pinter. After the Supreme. After the Supreme Court s decision, the Wa SupremeSupreme Court had an opportunity to change its position in light of Supreme Court had an opportunity v.v. Hoffer, 113 Wash 2d 148, 151-52,, 113 Wash 2d 148, 151-52, 776 P.2d 963, 964-65 (1989)., 113 Wash 2d 148, thethe substantial contributive factor test was the still the appropriate standard under thethe substantial contri SecuritiesSecurities Act in light of the Act sSecurities Act in light of the Act s structure and policies. The Court ga Pinter.. First, the purpose of the state statute. First, the purpose of the state statute was different than the federal thethe latter was also concerned withe latter was also concerned with protecting the latter was also concerne primarilyprimarily was concerned with protecting investors andprimarily was concerned with protecting investors Second,Second, the Second, the structure of the two statutes are different. While the federal statute had a se provisionprovision for liability for issuers (§ 11), the Uniform Securities Act did not. Third, the Court returnedreturned to the problem of firm commitment underwritings,returned to the problem of firm commitment u LegislatureLegislature would insulate issuers from liability whenLegislature would insulate issuers from liability and reports that were critical in informing investors. Id. 113 Wash 2d. at 152, 776 P. 2d at 965.

TheThe concerns of the Washington Supreme Court in HabermHaberman and Hoffer, and their understandingunderstanding of the purposes of the Uniform Securities Act, are sameunderstanding of the purposes thethe Supreme Judicial Courtthe Supreme Judicial Court demonstrated in its analysis of the Uniform Securities

TheThe SJC has clearly stated its view that the Act is redressive andThe SJC has clearly stated its view that the

toto provide substantial protection to the buyerto provide substantial protection to the buyer of secto provi

information.information. information. 442 Mass. at 51-52, 809 N.E. 2dinformation. 442 Mass. at 51-52, 809 N.E.

investors,investors, it isinvestors, it is likely that the Court would recognizeinvestors, it is likely that the Court wo

obtain the statute s objectives.

b. Some of the Plaintiffs were solicited by Bradford.

EvenEven if the Court finds thatEven if the Court finds that seller should be defined in accordance with

thatthat does notthat does not necessarily mean that Bradford and its officers andthat does not necessarily mean th

§410.§410. Persons that successfully §410. Persons that successfully solici§410. Persons that successfully sol

ownown financial ends may be held liable as sellers. Pinter 48 486 U.S. at 687. 486 U.S. at 687. Here, a

currentlycurrently alleged in the Amended Complaint, Kiszka, on behalf of Bradford,currently alleged in the Ame

atat least oneat least one of the Institutional Bondholders before its purchase regarding theat least one of the Instit

bondbond issue. Such contact couldbond issue. Such contact could be found to constitute solicitation and suc

bebe sufficientbe sufficient be sufficient to allow the § 410 claims against the Bradford Defendants to go forwar

LadiesLadies Investment Club v. SchlotzsLadies Investment Club v. Schlotzsky Ladies Investment Club v

solicitationsolicitation by issuer in a firm underwriting issuance issolicitation by issuer in a firm underwriting issuar

claim;claim; whether issuer acted as underwriter s agent is issue for summary judgment). The Institutional

Bondholders should be given leave to amend to allege solicitation.

3. PlaintiffsPlaintiffs have sufficiently stated a Plaintiffs have sufficiently stated a claimPl Uniform Securities Act.

DDefendants Defendants attack on the merits of Plaintiffs Uniform Securities Act claim repeatDefen assertionsassertions that the complaintassertions that the complaint fails to state the existence in theassertions tha falsefalse or misleading statements or omissions. For the reasons set forthfalse or misleading statements or omiss statementsstatements identified in Section I do state claims for false and misleading sstatements identified in unnecessary to repeat the analysis.

InIn evaluatingIn evaluating the sufficiency of Plaintiffs Uniform Securities Act claims, theIn evaluating keepkeep in mind that plaintiffs are not required tokeep in mind that plaintiffs are not required to plead negligence toto state a claim under § 410. Marram, 442 Mass at 51-53, 809 N.E., 442 Mass at 51-53, 809 N.E. 2d at 1025-27 a Further,Further, becausFurther, because frauFurther, because fraud is not an element of the statutory claim, Plai particularitparticularityparticularity rparticularity requirements of Rule 9(b). Stolzoff v. Waste Systems Intern App.Ct.App.Ct. 747, 764, 792 N.E. 2d 1031,App.Ct. 747, 764, 792 N.E. 2d 1031, 10App.Ct. 747, 764, 79 erroneously dismissed for failure to comply with Mass.R.Civ.P. 9(b))

TheThe Bradford Defendants assertion that estimates and projections cannot be the basisThe Bradford D claimclaim under § 410 is erroneous. The Supreme claim under § 410 is erroneous. The Supreme Judicial actionableactionable if it isactionable if it is inconsistent with factsactionable if it is inconsistent with facts known atat 58, 809 N.E. 2d at 1030 n. 24. Similarly incorrect is their assertion that general written disclaimersdisclaimers can overcome specific misrepresentations of fact. disclaimers can overcome specific misrep warningwarning that investment manager couldwarning that investment manager could concentrate holdings in o lawlaw refute plaintiff s claim that that defendant made specific misrepresentation concerning diversification).diversification). Indeed thediversification). Indeed the Court cited authority that alleged misrepres volatility ordinarily raise genuine issues of fact. Id. at 58, 809 N.E.2d at 1030.

4. Plaintiffs Claims Are Not Precluded By A Statute of Repose

Astonishingly,Astonishingly, Astonishingly, theAstonishingly, the Astonishingly, the BradfordAstonishing theythey they kthey knowingly signed to induce Plaintiffs to dismiss voluntarily their original timely action Plaintiffs Plaintiffs Uniform Security Act claims are barred by a statute of reposePlaintiffs Uniform Secu astonishingastonishing fastonishing for at least two reasons: (1) § 410(e) is not a statute of repose, and (2) the Defendants are contractually bound not to raise the defense.

StatutesStatutes of repose completely eliminate aStatutes of repose completely eliminate a cause of actionSt ofof action has accrued or been discovered. Klein v. Catalano, 386 Mass 701, 708, 437, 386 Mass 701, 708, 437 N (1982). They commence from a definitely established date such(1982). They commence from a definitely es omissionomission occurred which forms the basis of the cause of action. Nissan MoNissan Motor Co CommissionerCommissioner Of Revenue, 407 Mass 153, 158,, 407 Mass 153, 158, 552 N.E. 2d 84 (1990). A stat aa bright line method ofa bright line method of determining when the statutory period starts anda bright line meth obtainobtain certainty that potential liabilitiesobtain certainty that potential liabilities are extinguished. Nett v.Net N.E.N.E. 2d 130, 137 (2002). AN.E. 2d 130, 137 (2002). A statute ofN.E. 2d 130, 137 (2002). A statute of limitat normally normally governs the time within which legal proceedings must be brought after the cause nor actionaction accrues. action accrues. They ordinarily do not begin to run until the date ofaction accrues. They ord ofof discovery. McGuiness v. Cotter, 412 Mass 617, 621-22, 591 N.E. 2, 412 Mass 617, 621-22, 591 N Ordinarily,Ordinarily, when the Legislature intends to create a statute of repose, it does so directly by language thatthat unambiguously announces no exceptions to the statutory period. Id. 412 Mass at 622, 591 N.E. 2d at 663.

SectionSection 410(e), which provides that no person may sue for a violation oSection 410(e), which pr thanthan four years after its than four years after its discovery than four years after its discovery does not creat

limitationlimitation period runs or a bright line which will enable a defendant tolimitation period runs or a bright liabilityliability has beenliability has been extinguished.liability has been extinguished. Indeed, commencement o discovery, discovery, which is a classic commencement of a normal limitations period. N discovery, wh periodperiod tied to anperiod tied to an act or omission by the defendant. Thus, it is hard to see howperiod tied to anyany defendant repose, since itany defendant repose, since it starts to run atany defendant repose, since it starts (or(or even decades) (or even decades) after the event (or even decades) after the event in question. The langua unambiguousunambiguous without exception finality that isunambiguous without exception finality that is thethe best evidence that § 410(e) isthe best evidence that § 410(e) is a statute of limitation and not repose is that CourtCourt has described the four year term of §Court has described the four year term of § 410(e) as a limitation <u>Marram</u>, 442 Mass at 54, 809 N.E. 2d at 1028, and n. 20.

EvenEven if § 410(e) was a statuteEven if § 410(e) was a statute of repose,Even if § 410(e) was a statute o bebe tolled, but whether it can be waived. Plaintiffs do not rely on anbe tolled, but whether it can be waived proceedproceed with their action, butproceed with their action, but rather on Defendants intentional waiver of their ofof limitationof limitations or staof limitations or statute of repose defense based on the time covered by the T DefendantsDefendants raise noDefendants raise no reason why they could not legallyDefendants raise no reason clearclear that they can.clear that they can. Unlike most statutes, the Uniform Securitiesclear that they can. Unlik whichwhich provisions of thewhich provisions of the statute cannot be waived.[56] Only a person acquiring a secur waivewaive another person s compliance with the Acwaive another person s compliance with the Act s p limitationslimitations period is as essential to the statutory schemelimitations period is as essential to the statutory

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[55] ToTo the extent the Court cannot reasonably infeTo the extent the Court cannot reasonably infer To the extent the waivedwaived their rightwaived their rightswaived their rights waived their rights towaived their rights to waived their rights to raisewaived t

[56] SectionSection 410(g) states that any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this chapter or any rule or order hereunder is void.

non-waiver provision would also cover the protections the Act grants to security sellers.[57]

Finally,Finally, the BradfordFinally, the Bradford DefendantsFinally, the Bradford Defendants fail to info fromfrom raising this argument. Thefrom raising this argument. The Tolling and Standstill Agreements signedfro Defendants state that

> EachEach Potential Defendant hereby agreesEach Potential Defendant hereby agrees and acknowl shallshall not plead or raise andshall not plead or raise and is estopped from pleading or raising the p timetime during the Tolling Period as part of a defense of bar time during the Tolling Period as Limitations Period with respect to any Claim. (emphasis added)

TheThe Bradford Defendants do not explaiThe Bradford Defendants do not explain wThe Bradford Defendan allowedallowed to enjoy the valuable consideration they received for executing them Plaintiffs allowed to enjoy ofof a timely filof a timely filed of a timely filed law suit while the Plaintiffs should be wholly deprived of t bargain.bargain. bargain. The Court should not tolerate the Bradford Defendants bargain. The Court should not to with regard to this purported defense.

B. PPlaintiffs Plaintiffs Fraud Claims Plead Reliance WiPlaintiffs Fraud Claims Plead Reliance Withl Could Reasonably Rely on the Representations In Bradford s Official Statement

Defendants Defendants Defendants arDefendants arguments in favor of dismissing Plaintiffs fraud claim theirtheir earlier assertions that the Amended Complaint fails to plead material misrepresentheir earlier asser scienterscienter and personal involvement of the individual defendants to the requisitescienter and personal invol requiredrequired by Fed.R.Civ.P. 9(b). Plaintiffs haverequired by Fed.R.Civ.P. 9(b). Plaintiffs have addressed th Rule 10b-5 causes of action and there is no need to repeat the analysis.

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[57] InIn fact, the Bradford Defendants fail to cite any authority that statutes of repose iIn fact, the Bradford Defendant cannotcannot be voluntarily waived. Undoubtedly, this iscannot be voluntarily waived. Undoubtedly, this is because the purpose of stat ofof defendants the benefit of a date certain when liability will end, alof defendants the benefit of a date certain when liability w reasonablereasonable expectation that theyreasonable expectation that they will not be called upon to resist anreasonable expectation that t maymay be lost. Nett v. Bellucci, 437 Mass.630,, 437 Mass.630, 639, 774 N.E. 2d 130,, 437 Mass.630, 639, 774 N.E. 2d 130, 137 (2002) protectionprotection of a statute of repose, particularly sophisticated litiprotection of a statute of repose, particularly sophisticate expectation of repose and understand the risks taken by agreeing to such aexpectation of repose and understand the risks taken by agree forfor the specific benefitfor the specific benefit of a class of persons, there is no reason that members of that class cannot intelligently waiv protection, particularly if they are receiving valuable consideration in return.

InIn evaluating Plaintiffs common law fraud claims, however, the Court should recall that althoughalthough the circumstances of fraud must be plead with specificity under Rule 9(b), the heightened pleadingpleading standards for scienpleading standards for scienterpleading standards for scienter and proof of commoncommon common law fraud, the specificity requirement only extends to the particulars of the misleac statement.statement. Rodi v. Southern New EnglandRodi v. Southern New England School of Law, 389 F. 3d 389 ItIt is satisfied when the complaintIt is satisfied when the complaint states the who, what, where andIt is satisfiec fraudulent misrepresentation. Alternative Systems Concepts, Inc. v. Synopsys, Inc. 374 F.3d 23, 2929 (1st Cir. 2004). The other elements29 (1st Cir. 2004). The other elements of fraud, such as intent and kno general terms. Rodi, 389 F. 3d at 15

AllAll Defendants assert that Plaintiffs have failed to adequately plAll Defendants assert that Pl BondholderBondholder Plaintiffs however, have pled that the false statements in the Official Statement were mademade for the expressmade for the express purpose of inducing the Plaintiffs to purchase the bonds, AC,made theythey did indeed purchase thethey did indeed purchase the bonds in reliance upon the Defendants false statemen AC,AC, ¶¶AC, ¶¶ 85, 97, 100 and that they would not have purchased the bonds if they had not beenAC, ¶¶ 85, 9 AC,AC, ¶ 85. With regardAC, ¶ 85. With regard to ACAC, ¶ 85. With regard to ACA, the Amended Co Statement,Statement, AC, ¶ 66, that its conversation with Kiszka reinforced the misleadiStatement, AC, ¶ 66, t omissions,omissions, ¶ 66, that the misleading statements in thomissions, ¶ 66, that the misleading statements in ACAACA to issue anACA to issue an insuranceACA to issue an insurance policy, ¶¶ 97, 100 and that ACA reliec OfficialOfficial Statement (and in the conversation with KiOfficial Statement (and in the conversation with I AuthorityAuthority cited by the Defendants establisAuthority cited by the Defendants establishes that Authority BeazerBeazer East, Inc., 18 F. Supp. 2d 70, 86 (D. Mass. 1998)(allega, 18 F. Supp. 2d 70, 86 (D. Mass. 1998)(allegati falsefalse representations, theirfalse representations, their agent reviewed the representations and that they then pu

in reliance upon representations adequately pleads reliance in conformity with Rule 9(b)).[58]

TheThe Bradford Defendants contend that Plaintiffs could not reasThe Bradford Defendants contend th

misremisrepresentatimisrepresentationsmisrepresentations and omissions because the other disclosures in the O

themthem of the dangers faced. Putting asthem of the dangers faced. Putting aside the Brathem of the dang

disclaimersdisclaimers in the Official Statement and the financial results,[59] they argue the warnings that

BradfordBradford might not be able toBradford might not be able to achieve its financial objectives make it unreas

toto rely on other information that might be incorrect or misleading. In essence, they argue that since

thethe investors were warned of the potential risk, it is irrelevant if the Defendants conceathe investors wer

misstated facts that would have allowed Plaintiffs to evaluate the risks for themselves.

TheThe First Circuit sThe First Circuit s recent decision in Rodi Rodi v. Southern New England School of

3d3d 5, 14-17 (1st Cir. 2004) makes Cir. 2004) makes short work of the Bradford Defendants contentions. In Cir.

plaintiffplaintiff alleged that the Southernplaintiff alleged that the Southern Newplaintiff alleged that the Southern N

prprospectprospect foprospect for ABA certification when he applied for admission and matriculated. The law

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[58] TheThe casesThe cases cited by the Bradford Defendants clearly relate to situations not beforeThe cases cited by the B LupronLupron Marketing andLupron Marketing and Sales Practices Litigation, 295 F. Supp. 2d 148,175 (D. Mass. 2003), there, 295 F. S nono dispute no dispute that the plaintiffs either did not consult the fraudulent average wholesale price or knew it was inflated. Here thethe Plaintiffs read the Officialthe Plaintiffs read the Official Statement andthe Plaintiffs read the Official Statement and did not know doesdoes not explicitly state that the Plaintiffs read the Official Statement, Plaintiffs are willing to amend.) does not explicitly state tha BrownBrown & Williamson Tobacco Corp., 122 F. Supp. D 194, 208 (D. Mass 2000), the, 122 F. Supp. D 194, 208 (D. Mass 2000), the specificspecific promotional material thatspecific promotional material that contained specific promotional material that contained mi sufficiently identified the false statements their fraud claims are based upon.

[59] TheThe Bradford Defendants breathless characterization of the OfficThe Bradford Defendants breathless characte believebelieve that every page contained a black legend IMPENDING DOOM. They ignore thatbelieve that every page contained investment investment grade. investment grade. They also ignore that the Official Statement investment grade. They also ignore inin eight years (400 to 550), the endowment had increased 204% in the same period and net assin eight years (400 to 550), the endow increasedincreased from $11.9 million in 1994 to $16.8 million inincreased from $11.9 million in 1994 to $16.8 million in 1997. Although for several years infor several years in a rowfor several years in a row the Official Statement also reveals that Bradford s alumni gave g companycompany that ran nine yearscompany that ran nine years of deficits might likely be out of business, the Bradford Defendants fail thatthat it is not uncommon for non-profit entities to routinelthat it is not uncommon for non-profit entities to routinely run opt contributions.contributions. contributions. If professionals as sophisticated as Standard & Poor s ratedcontributions. If professionals as s DefendantsDefendants can hardly argue that plaintiffs claims should be dismissed at the pleading stage because, asDefendants can hardly any investor who perused the Official Statement would obviously know this was a financial black hole.

claimedclaimed claimed the former student could not reasonably rely on the representations because the schocla

cataloguecatalogue specifically disclaimed any representation that the school would becatalogue specifically discla

priorprior to graduation. The law school argued that since the plaintiff sprior to graduation. The law school argu

promisepromise ofpromise of accreditation,promise of accreditation, and the disclaimer flatly contradicted any suc

the promise was objectively unreasonable.

The First Circuit rejected such arguments:

> ThisThis argument erects,This argument erects, andThis argument erects, and then attacks, a straw
> complaintcomplaint allege that the defendants falsely implied complaint allege that the defendants fa
> toto achieve near-term accreditation. to achieve near-term accreditation. This is a meaningful distin
> thingthing for an actorthing for an actor to demur when asked tothing for an actor to demur when
> ItIt is quite another for an actor to mislead a person into believing It is quite another for an ac
> actoractor posseactor possesses mactor possesses means and abilities fully within its control.
> distinction,distinction, the defendantdistinction, the defendants distinction, the defendants distincti
> aasas thas the disclaimer does not cover the alleged misrepresentations, it cannot
> defeat them.

389 F.3d at 16

TheThe parallel to this case is obvious. Here Defendants characterize Plaintiffs The parallel to this c

flowinflowingflowing from the broken promise to repay the bonds or meet enrollment goals. Defendants claflov

thathatthat since Bradford warned that it might not be able to meet these goals, any reliance othat since Brac

promisespromises was unreasonable. But Plaintiffs do not complain thatpromises was unreasonable. But Plaintiffs

flowflow or class enrollments. They claim Defendants misrepresented and concealed oflow or class enrollment

financialfinancial data that would have allowed them to realizefinancial data that would have allowed them to reali

thethe bond debt, and that Bradford had objective infothe bond debt, and that Bradford had objective inform

disclosed objectives.

AA second ground in Rudi for denying the law school s for denying the law school s unreasonable relianc

thatthat Massachusetts courts consistently have held that discl that Massachusetts courts consistently have

fraudulentfraudulent misrepresentation claims. 379 F.3d at 17, citing Bates v. Southgate,, 308 Mass, 308 Mass 1

N.E.N.E. 2d 551, 558 (1941) and others. The CourtN.E. 2d 551, 558 (1941) and others. The Court recognized that

policypolicy thatpolicy that a party may not contract out of fraud, policy that a party may not contract out of frau

onon an undevelopedon an undeveloped record at the motion to dismisson an undeveloped record at the motion t

decision.decision. 379 F.3d at 17. Indeeddecision. 379 F.3d at 17. Indeed, decision. 379 F.3d at 17. Indeed

reliance argument relies were all decided on a full factual record at summary judgment or trial.[60]

UnderUnder MassachusUnder Massachusetts law, reUnder Massachusetts law, reasonable reliance is or

See Roti, 389 F.3d at 16, Marram, 442 Mass. at 59-61, 809 N.E. 2d at 1031-32., 442 Mass. at 59-61, 809 N.E. 2d

specificallyspecifically cautionsspecifically cautions against granting such motions without a complete factual re

shouldshould follow should follow tshould follow those appellate courts advice and deny Defendants motion

count.

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[60] NonNoneNone of theNone of the cases relied upon by the Bradford Plaintiffs are remotely analogous. All three inv allegedalleged oral misrepresentations. In two of the cases, the representatalleged oral misrepresentations. In two of the cases, the re plaintiffplaintiff had either signed or was bound by. Sound Techniques, Inc. v. Hoffman, 50 Mass. App. 425,, 50 Mass. App. 425, 737 N (2000)(2000) (lease contradicted oral representation); Kuwaiti Danish Computer Co. v. Digital Equipment Corp., 438 Mass 459,459, 781 N.E. 2d 787459, 781 N.E. 2d 787 (2003)(price quotation contradicted oral459, 781 N.E. 2d 787 (2003)(price quotation cont thethe parts of the Official Statement onthe parts of the Official Statement on which the Plaintiffs rely. There is nothing inconsistent with d andand objectives but then observing that thereand objectives but then observing that there can be no promise that the goals will be met. hadhad personal knowledge had personal knowledge that the had personal knowledge that the representation was false. Cote v. Astra 1998). The Amended Complaint does not allege that any1998). The Amended Complaint does not allege that any of the Plaintiffs had a read the Official Statement.

C. TheThe Bradford Defendants Responsible For the Misrepresentations In the Official StatementStatement CanStatement Can BeStatement Can Be Held Liable For Negligent Misrepres Bond Purchasers.

TheThe only argument unique to Defendants opposition to Plaintiffs neglThe only arg misrepresentationmisrepresentation count is the Bradford Defendants assertion thatmisrepresentation count is the purchaserspurchasers for a failure topurchasers for a failure to use reasonable care. They contend that since the Plai bonds from Advest and had no contact with them, they owed no duty to the Plaintiffs.

PuttingPutting aside that the Amended Complaint expressly statesPutting aside that the Amended Compla reliedrelied upon his representations before issuing insurance on the bonds,relied upon his representations before thethe duties owed by persons who know third parties will rely upon the informathe duties owed by persons wh misguided.misguided. As the Bradford Defendants reluctantly concede, in Massachusetts liabimisguided. As the B misrepresentationmisrepresentation is misrepresentation is notmisrepresentation is not limited by privity. Ins determineddetermined by the principles of § 552 of the Restatement (Second) ofdetermined by the principles of has adopted. That section provides:

> OneOne who,One who, in the course of his business,One who, in the course of his business, profes ootherother transaction in which he has a pecuniary interest, supplies falsother transactio informationinformation for theinformation for the guiinformation for the guidance of others subjectsubject to liability for pecuniary loss causesubject to liability for pecuniary loss cause reliancereliance upon the information, if he fails to ereliance upon the information, if he fai comcompetencecompetence in obtaining or communicating the information. (Empcompetenc added).

See.See. e. g. Marram, 442 Mass at 60, 809, 442 Mass at 60, 809 N.E.2d at 1031, n. 25; Golber v.Golber v. BayBar 46 Mass. App. Ct. 256, 257 (Mass. App. , 1999).

TheThe persons who may reasonably rely on the information provided is limited. SectionThe persons wh limitslimits the loss limits the loss suffered to limits the loss suffered to a person or one of a limited group o guidanceguidance he (the information provider) intendstoguidance he (the information provider) intends to supply

intendsintends to supply it... .intends to supply it... . Nycal Corp. v. KPMG Peat Marwick LLP, 426 Mass 491,, 4 1368,1368, 1371-72 (1998).[61] Third parties who do not deal Third parties who do not deal directly with the infor havehave a cause of action, accordingly, if thhave a cause of action, accordingly, if the informathave a caus information.information. Further, the comments to § 552 makeinformation. Further, the comments to § 552 make isis to become a plaintiff be known oris to become a plaintiff be known or identified to the defendant. is to becom representationrepresentation intendsrepresentation intends it trepresentation intends it to reach either a particula muchmuch larger class who might sooner or later have access to the information, and that the plaintiff provesproves to beproves to be a member or such a particular class. Restatement (Second) of Torts,proves to be h.h. SeeSee also, Nycal Corp. v. KPMG Peat Marwick LLP, 426 Mass at 497, 688 N.E. 2d at 1372. In short,short, the absence of privity can be short, the absence of privity can be overcome short, the absence defendant s knowledge of reliance by a particular class of persons.

Here,Here, the Complaint sufficiently alleges that the Plaintiffs are within theHere, the Complaint sufficien BradfordBradford Defendants expected the Official StatementBradford Defendants expected the Official Stateme AmAmendedAmended Complaint states that the negligent statements were made for the express purpose Ame indinducinginducing the Plaintiffs to purchase the bonds and write an insurance policy. At this stage of tinduc litigation, this is all that needs to be alleged.

TheThe Bradford Defendants citeThe Bradford Defendants cite authority that holds that corporateThe Br negligentnegligent representation to open market security purchasers who rely upon their publicly issued statements.statements. Thstatements. There is a sustatements. There is a substantial difference, however, betw aa public company whose stock can be purchased by anyone, and the rea public company whose stock can be

[61] TheThe The informationThe information The information mustThe information must The information must alsoThe infor or aor a similar transaction.or a similar transaction. Nycal Corp. v. KPMG Peat Marwick LLP, 426 Mass at 496, 688 N.E. 2d at 1371-7 is no dispute that the Bradford Defendants prepared the Official Statement for the bond offering.

OfficialOfficial Statement for a bond offering of an entity that does not otherwise issue publicOfficial Statemen

InIn the later case, the statements are made to a much smaller class,In the later case, the statements are made to a mu

within the class will rely upon them is much greater.

A purchaser of securities in A purchaser of securities in an init A purchaser of securities in an initial

public public is necessarily dependant upon the Offeringpublic is necessarily dependant upon the Offering Stat

aboutabout the previously private organization. Such organizations do not publicly issue financial

statementsstatements or other informational briefings. Thestatements or other informational briefings. They d

statisticsstatistics and operational results. They are generally not followed bystatistics and operational results. Th

BradfordBradford and the Bradford Defendants had to have expected thatBradford and the Bradford Defendants ha

debt securities would view the Offering Statementdebt securities would view the Offering Statement as the prim

advisabadvisabilityadvisability of the investment. The Offering Statement was written and promulgated by the Brad

DefendantsDefendants specifically for the puDefendants specifically for the purDefendants specifically for th

investorsinvestors in the initial offering. It knew recipients of the Offering Statementinvestors in the initial offe

information contained therein in making their investment decision.

On the other hand, secondary market purchasers of securities of a public corporationOn the other hand, s

farfar more diffuse group. They represent a group of peoplefar more diffuse group. They represent a group of p

pointspoints in time. They have been exposed to a great variety of information abopoints in time. They

corporcorporation,corporation, corporation, includingcorporation, including corporation, including S.E.C.corporati

mediamedia coverage, and even rumor and supposition. Themedia coverage, and even rumor and supposition. The

dodo ndo notdo not necessarily know who the holders of the securities are, and have probably never

communicatedcommunicated intentionally with many of them. Thecommunicated intentionally with many of th

mightmight be the result of a wide variety of factors, only one of which is information flowing from

management.

NotNot surprisingly, therefore, those cases which lookNot surprisingly, therefore, those cases which look at findfind that it is different from the secondary market find that it is different from the secondary market situfind InIn re Bank of Boston Securities Litigation 762 F.Supp. 762 F.Supp. 1525 762 F.Supp. 1525 (D. Mass. 1991) is t thisthis this District. In that case, Judge Harrington considered the state law negligent misrepresentatthis Distri claiclaimsclaims of secondclaims of secondary market purchasers and dismissed them because they were basec disseminateddisseminated information disseminated information and there disseminated information and the extentextent of public reliaextent of public reliance on itextent of public reliance on its public statements. F broughtbrought by brought by the brought by the public offering purchasers (the acquisition class), but simp acquisitionacquisition class plaintiff would be required at trial to show direct reliance on the defacquisition c representations.representations. In refusing to dismiss the acrepresentations. In refusing to dismiss the ac regardingregarding the plairegarding the plaintregarding the plaintiffs ability to prove reliance at trial, ...at th makemake a detmake a determinmake a determination as to their ability to do so. Id. at 1536. See also E ExtrusionExtrusion Technologies, 150 F.R.D. 433 (D. Mass. 1993)(same holding)., 150 F.R.D. 433 (D. Mass. 199 thatthat the small class of public offering purchasers stand on a different footing from the secondary marketmarket purchaser who presumptively cannot satisfymarket purchaser who presumptively cannot satisfy the e in the initial offering, cannot have the negligent misrepresentation claims dismissed at this time.

Finally,Finally, theFinally, the Bradford Defendants have raised the novel argument that theFinally, the Bra ofof the Restatementof the Restatement apply only to professionals such as lawyers, accountants, and architects, ar toto corporate officers and directors who prepare securities filings. to corporate officers and directors wh unsupportedunsupported by anyunsupported by any Massachusetts case law, and flies in the faceunsupported by a specificallyspecifically attaches liability to a providerspecifically attaches liability to a provider of negligent info

business,business, profession, *or employment*... Clearly the drafters of t... Clearly the drafters of the Rest...

corporatecorporate employees, in addition to businesses and professionals,corporate employees, in addition to busi

nnegligentnegligent misrepresentation. The Bradford Defendants provide no rationale why corporate

employeesemployees who fail to exercise reasonable care in providingemployees who fail to exercise reasonable ca

relyrely upon should be treated differenrely upon should be treated differentlyrely upon should be treated differ

includingincluding Marram, have corporate officers , have corporate officers who th, have corporate officers

misrepresentation.misrepresentation. misrepresentation. This Court should avoid a wholesalemisrepresentation.

law.

D. There Is No Basis To Dismiss The Plaintiffs Chapter 93A Claims

TheThe arguments to dismiss Plaintiffs The arguments to dismiss Plaintiffs Chapter 93AThe arguments to

to Plaintiffs other causes of action. Plaintiffs willto Plaintiffs other causes of action. Plaintiffs will only address

thethe Chapter 93Athe Chapter 93A claims and rely on the early sections of this memorandumthe Chapter 93A cla

arguments.

Defendants Defendants arguments that Plaintiffs complaiDefendants arguments that Plaintiffs com

rascalityrascality israscality is baseless. rascality is baseless. It is well established that actionable claims of

negligentnegligent misrepresentation cannegligent misrepresentation can qualify as unfair and deceptive trade pra

c.c. 93A, § 11. Marram, 442 Mass, 442 Mass at 62, 809 N.E., 442 Mass at 62, 809 N.E. 2d at 1032-33 (conduct th

misrepresentationmisrepresentation or violations of M.G.L. c. 110A may constitute violations ofmisrepresentation

StStolzStolzoffStolzoff v. Waste Systems Int. Inc. 58 Mass. App. Ct. 747, 765, 792 N.E. 2d 1031, 1045 (2003)

(conduct(conduct that constitutes fraud or negligent misrepresentation may constitute violation of M.(conduct th

c.c. 93A, § 11). Accordingly, if any of plaintiffs c. 93A, § 11). Accordingly, if any of plaintiffs claims c. 93

action for violation of § 11.

TheThe BradfordThe Bradford PlaintiffsThe Bradford Plaintiffs assert they have not had a business relatio andand therefore 93A liability will not attach. Privity is notand therefore 93A liability will not attach. Privity is n thethe plaintiffs and defendants are involved in a commercial relationship which ithe plaintiffs and defendan insignificant.insignificant. See ReismaReisman v. KPMG PeReisman v. KPMG Peat Marwick 965 F.Supp. BostonBoston Survey Consultants 388 Mass. 320, 321. 446 N.E. 2d 681 (1983) ; Reisman v. KPMG Peat Marwick 57 Mass. App. Ct. 100, 124, 787 N.E. 2d 1060, 57 Mass. App. Ct. 100, 124, 787 N.E. 2d 1060, 1078 (2 whetherwhether the commercial relationship between the preparers and signerswhether the commercial relatio forfor a publicly offered securityfor a publicly offered security and the initial purchasers of suchfor a publicly offe Massachusetts precedent demonstrates that it is not.

ItIt is apparentIt is apparent that there has been a convergence, if not outright identity, betweenIt is apparent ofof reliance under §of reliance under § 552 of the Restatement (Second) of Torts, discussed in Sectionof re andand the concept of a transactional business relationship which and the concept of a transactional business relat Chapter 93A. This is most evident in the case ofChapter 93A. This is most evident in the case of Spencer v.Sp N.E.N.E. 2d 1082 (2000). In thatN.E. 2d 1082 (2000). In that case, the Appeals Court reviewed theN.E. 2d 1082 accountingaccounting firm to purchasers of securities of a public company thataccounting firm to purchasers of sec rejectedrejected the claim because the record was devoid ofrejected the claim because the record was devoid of a knowledge of any reliance by participants on the audit soknowledge of any reliance by participants on the audit ThisThis is precisely the This is precisely the sameThis is precisely the same factor which determines liab MassachusettsMassachusetts decisions addressing the applicabilitMassachusetts decisions addressing the app followedfollowed thfollowed the same line as cases deciding the applicability of § 552 of the Restatement. Se example,example, Salkind v. Wang, 1995 WL 170122 (D. Mass. 1995) (open market p, 1995 WL 170122 (D. commercialcommercial relationship withcommercial relationship with corporate officials); Young v. Deloite & T

1818 Mass.18 Mass. L. Rptr. 287 (Mass. Super.) (no commercial relationship where defendant s activities18 Mass. notnot intended to help solicit people to purchase the company snot intended to help solicit people to purchase the 809809 N.E. 2d809 N.E. 2d at 1017 (93A claim upheld for original purchaser809 N.E. 2d at 1017 (93A claim uphel v.v. Waste Systems International, 58 Mass. App. Ct. at, 58 Mass. App. Ct. at 765,, 58 Mass. App. Ct. at 765, 792 forfor original purchasers misled byfor original purchasers misled by corporate officials);for original purchasers App.App. Ct. at 124, 787 N.E. 2dApp. Ct. at 124, 787 N.E. 2d at 1078 (auditor with direct contact with prospectiv to liability).

OfOf the factors cited in those cases as supporting 93A liability,Of the factors cited in those cases as sup TheThe Bradford officials certainlyThe Bradford officials certainly knew that prospective purchasers would look at onon the Official Statement. They preparedon the Official Statement. They prepared and signed the Official State andand Advestand Advest intendand Advest intended to use it to attract investors to purchase the securitie prospectiveprospective purchasers had few or no other sources of infoprospective purchasers had few o impoimportantly,importantly, they knew prospective purchasers would rely on the Statement. Theseimpo overwhelminglyoverwhelmingly support the viabilityoverwhelmingly support the viability of a 93A claim. At ao toto conclude that there is no possible set ofto conclude that there is no possible set of facts that would preclude t fromfrom the Bradford Defendants under ch. 93A, and accordingly, this claim cannot be dismissed at this stage of the proceedings.

E. TTheThe Court Cannot Consider The Trustee Defendants Affirmative Defense ThThe Court MassachusettsMassachusetts Statutes ImmunizeMassachusetts Statutes Immunize Them From Liab EstablishEstablish TheEstablish The Defense CannotEstablish The Defense Cannot Be Found In T Documents The Court May Consider On a Motion To Dismiss

TheThe Trustee DThe Trustee DefendThe Trustee Defendants seek to dismiss the Massachusetts cause MassachusettsMassachusetts statutes limit liability for uncompensated trustees of non-profitMassachuse corporations,corporations, M.G. L. c. 231, §§ 85K and 85W. corporations, M.G. L. c. 231, §§ 85K and 85W. Be notnot receive compensation other than reimbursement for actual expenses to obtain the immunity.not receive com allegationsallegations to that effect are contained within the Amended Complaint, but Defendants rely upon an Affidavit of Karen Sughrue to make the necessary factual showing.

TheThe Court must deny the TrusteeThe Court must deny the Trustee Defendants efforts to apply the sta aa Motion To Dismiss. this court may onlya Motion To Dismiss. this court may only consider affirmative defenses fromfrom the allegations offrom the allegations of the complaint,from the allegations of the complaint, the docume record,record, and other matters of which the court may take judicial notice. Banco Santander de Puerto RicoRico v. Lopez-Stubbe (In re Colonial Mortgage Bankers, Corp.), 324 F.3d 12, 16 (1st Cir. 2003). ConsiderationConsideration of documents not attached to Consideration of documents not attached to theCon forbidden.forbidden. Waterson v. Page, 987 F.3d 1, 3 (1st Cir. 1997). Nor may, 987 F.3d 1, 3 (1st Cir. 1997). No Shabazz v. Cole, 69 F.Supp.2d 177, 185 (D. Mass. 1999).[62]

WithoutWithout consideration of the Sughrue affidaWithout consideration of the Sughrue affidavit, the

[62] TheThe Plaintiffs woulThe Plaintiffs would vigoroThe Plaintiffs would vigorously oppose any effort to convert the DismissDismiss intoDismiss into a Motion For Summary Judgment pursuant to Fed.Dismiss into a Motion For Summary Judgment pursu untiluntil the Court rules on the sufficiency of their complaint pursuant to the PSLRA. Accordingly, they cannot conduct thethe the factual investigation to determine whether the Trustee Defendants truly qualify for the Massachusetts immuthe factual inv statutes.

factualfactual showing necessary to qualify for the statutory immunities.[63] Consequently, their motion to dismiss on these grounds must be denied.[64]

IV. PLAINTIFFSPLAINTIFFS SHOULD BE GIVEN LEAVEPLAINTIFFS SHOULD BE GIVEN LE THEYTHEY HAVE FATHEY HAVE FAILETHEY HAVE FAILED TO PROPERLY PLEA ACTION.

InIn the event the Court finds that there are pleading deficiencies in the Amended Complaint, leaveleave isleave is requested to correct them.leave is requested to correct them. Given the requirement that Pla dismisseddismissed unless it is beyond doubt that plaintiffs can prove no set of facts that would entitle them toto relief, <u>Swierkiewicz v.Swierkiewicz v. Sorema, N.A.</u>, 534 U.S. 506 (2002), and the liberal amendment, 534 U.S Rule 15, such leave is ordinarily granted.

Advest,Advest, however, has Advest, however, has aAdvest, however, has already stated that it opposes groundground the Plaintiffs have already amended their complaint once. Thatground the Plaintiffs have already a notnot substantive. It merely addednot substantive. It merely added state court claims which derived from the sa whenwhen the Superior Court stayed the Plaintiffs parallelwhen the Superior Court stayed the Plaintiffs parallel s beforebefore Defendants filed andbefore Defendants filed and served their motions to dismiss and, accordingly, points raised by their briefs. Plaintiffs should have at least onepoints raised by their briefs. Plaintiffs should hav claimed by the Defendants in their motions.

NorNor have Plaintiffs unduly delayed. Plaintiffs served this actionNor have Plaintiffs unduly delayed. Pla onon theon the nineteen defendants in October 2004. on the nineteen defendants in October 2004. It is the Defend

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[63] M.G.L.M.G.L. c. § 85K alsoM.G.L. c. § 85K also requires proof that Bradford was qualified as a tax-exempt organiza 2626 U.26 U.S.C. § 501(c)26 U.S.C. § 501(c)(3). There are no allegations in the Complaint to that effect and the Bradford Defend provided no evidence of Bradford s status with the IRS.

[64] PlaintiffsPlaintiffs do not accept that if TrusteePlaintiffs do not accept that if Trustee Defendants Plaintiffs do not accept t bebe entitled to dismiss the state law claims.be entitled to dismiss the state law claims. However, as this matter is not properly before th not brief these defenses at this time.

thanthan four months to prepare motions to dismiss. Plaintiffs have rthan four months to prepare motions to d

understandunderstand that Defendants require an additional two months to file a reply. understand that Defendants

Defendants Defendants good faith in requesting these extensions, butDefendants good faith in requesting these

these motions to dismiss fully briefed is not attributable to the Plaintiff.

AsAs demonstrated above, in theAs demonstrated above, in the event theAs demonstrated above, in the even

futilefutile and the Plaintiffs havefutile and the Plaintiffs have acted equitably and appropriately. Amendment sh

if necessary.

CONCLUSION

WHEREFORE,WHEREFORE, for the reasons set forth above,WHEREFORE, for the reasons set forth abo

denied in their entirety.

T.T. ROWE PRICET. ROWE PRICE TAX-FREE HIGHT. ROWE P
INC.,INC., SMITHINC., SMITH BARNEY INCOMEINC., SMITH
BARNEYBARNEY MUNICIPAL HIGH INCOMEBARNEY M
DRYDEDRYDENDRYDEN DRYDEN NATIONALDRYDEN NA
LOLOISLOIS aLOIS and JOHN MOORE, and ACA FINANCIA
GUARANTY CORPORATION

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